RECORD, CASE No. 15,405.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 1021.

THE STATE OF TENNESSEE AND THE COUNTY OF SHELBY, APPELLANTS,

vs.

THE BANK OF COMMERCE, J. A. OMBERG AND J. T. FARGASON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED SEPTEMBER 28, 1893.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 5, 1893.

1 No. 457.

Circuit Court of the United States, Western District of Tennessee.

STATE OF TENNESSEE and THE COUNTY OF SHELBY
vs.
THE BANK OF COMMERCE, J. A. OMBERG, and J. T. FARGASON.

Original Bill. Filed January 26th, 1893.

To the honorable judges of the circuit court of the United States for the western district of Tennessee:

Complainants respectfully state and show unto your honors as follows, to wit: (I.) By an act of the legislature of the State of Tennessee, passed February 29th, 1856, Benjamin Chandler and his associated were created a body politic and corporate under the name of the Chattanooga Savings Institution, with the usual powers of a banking company, said company being located, under the charter, at the city of Chattanooga, in Tennessee. By subsequent acts of the legislature of the State said institution was authorized to remove its situs to the city of Memphis, Tennessee, and its name was first changed to the Savings Bank of Memphis and afterwards to the Bank of Commerce, the last change in the name being made by an act passed March 12th 1873. (II.) Complainants are advised that under certain litigation heretofore arising between the
2 State and said bank the supreme court of the State in a case entitled State *v.* Butler and reported in 2 Pickle, 614, determined that the bank was in all respects organized under and had all the powers, privileges, and immunities expressed in the charter of said Chattanooga Savings Institution. By the 3d section of said charter it was enacted that said company should "pay to the State an annual tax of one per cent. on each share of capital stock, which shall be in lieu of all other taxes." The capital stock of said defendant bank is $1,000,000. A copy of said charter is filed as part of this bill, marked Exhibit A.

III. By section 14 of the general revenue law of the State, passed in 1887, the same being chapter 2 of the acts of that year, it was enacted as follows, to wit: "Be it further enacted, That this act shall not be so construed and shall not so operate as to exonerate or release from taxation any company or corporation whose charter exempts stock or shares thereof from taxation; but it is hereby enacted that in all cases where such stock is exempted, such company or corporation shall be assessed in such way as may be lawful; and in all cases in which by the terms or legal effect
3 of the charter the shares of stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of stock is fixed and prescribed and declared to be in lieu of all other taxes, taxes for State, county, and municipal purposes shall be assessed and levied at a rate uniform with the rate levied upon other taxable property upon the capital

stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus."

The defendant bank claims that both its capital stock and the shares of stock in the hands of its stockholders are exempt from taxation by virtue of its charter. Complainants, however, are advised and submit that the exemption contained in said charter if available to defendant bank or its shareholders (which is denied) applies to the shares of stock only and not to the capital stock of said institution, and that the latter is in any event subject to the taxing power of the State. On the theory that the shares
4 of stock are exempt from taxation and that the capital stock is subject to taxation, the said defendant bank is indebted to complainants respectively in the manner and amounts following, to wit:

Said capital stock was assessed—

For the year 1887 at	$342,000
For the year 1888 at	342,000
For the year 1889 at	399,000
For the year 1890 at	530,000
For the year 1891 at	466,500

For each of the years aforesaid the State levied upon all the taxable property within its limits an ad valorem tax of thirty cents on the $100, so that for the respective years aforesaid the defendant bank is indebted to the State for taxes duly assessed upon its capital stock in the following sums, to wit:

For the year 1887	$1,026
For the year 1888	1,026
For the year 1889	1,197
For the year 1890	1,590
For the year 1891	1,399 50

To complainant The County of Shelby the defendant bank upon that theory is indebted for the years and on the account
5 aforesaid as follows, to wit:

For the year 1887 (the rate being	95c.	on the	$100)	$3,249	
For the year 1888 ("	68c.	"	)	2,325	60
For the year 1889 ("	70c.	"	)	2,793	
For the year 1890 ("	78c.	"	)	4,134	
For the year 1891 ("	75c.	"	)	3,498	75

The amount aforesaid due from the defendant bank for each of the years aforesaid bears interest from the 1st day of February of the subsequent year. By another provision of said act of 1887, to wit, sec. 8 thereof, it was provided that no tax should thereafter be assessed upon the capital stock of said bank, but that the stockholders should be assessed and taxed on the market value of their shares of stock therein. By section 12 of the same act it was enacted that for the

purpose of collecting such taxes, and in addition to all other remedies therefor, it should be the duty of the president or managing officer of such bank to retain so much of any dividend or interest belonging to any stockholder as might be necessary to pay any and all taxes assessed in pursuance of this act. The above allegation that the defendant bank is indebted to the State and county as aforesaid for delinquent taxes upon its capital stock is made upon
6 the theory set up and undertaken to be maintained by defendant, but denied by complainant, that the facts bring the case within the provisions of sec. 14 above quoted. Complainants are advised that the capital stock in the hands of the corporation and the shares of stock in the hands of the stockholders are separate and distinct subjects of taxation; that in the absence of any charter exemption it would have been within the power of the State, without subjecting such legislation to the objection of double taxation, to have taxed both the capital stock of the corporation and the shares of stock in the hands of the stockholders; that the charter tax, bonus, or whatever else it may be called, of one-half of one per cent. to be paid to the State is a tax upon the shares of stock, and that the language "in lieu of all other taxes" means in lieu of all other taxes on the shares of stock. It has no effect, as complainants are advised and charge, to exempt the capital stock of the corporation from taxation.

It may be, however, that complainants are mistaken in the
7 foregoing construction of the charter, and that if defendant bank or its shareholders have any exemption at all (which is denied) the shares of stock are taxable and the capital stock of said institution exempt. The question is one of law and is submitted to the court for determination. Complainants are advised and submit that it will not in any event be held that both the capital stock and the shares of stock are exempt from taxation, and, being advised and believing that both were not exempt from taxation, the assessing officers of the State have from year to year, since and including the year 1888, demanded of the proper officers of said corporation a list of the names of the persons owning shares of stock therein on the 10th day of January of each year; but said corporation, by its officers, claiming that the shares of stock therein were not subject to taxation, has refused to furnish the names of the persons owning shares of stock in said corporation when demanded as aforesaid or to open its books to the assessing officer so that the names
8 of the stockholders and the amounts of their respective holdings could be ascertained. The said officers, accordingly, for the years 1888 and 1889, assessed the shares of stock in the form following, to wit:

For the year 1888, thus: "Bank of Commerce: Unknown owners of shares of stock, 6,000 shares, valuation, $399,000." For the year 1889, thus: "Unknown owners of 6,000 shares of stock of Bank of Commerce; valuation, $530,000."

The capital stock at the dates aforesaid was $600,000, divided into shares of $100 each. The rate of the State and county taxes respectively for the years 1888 and 1889 has been already stated, and if

the court should hold that the shares of stock of the defendant bank are subject to taxation and taxed, the shareholders therein are indebted to the State on account of unpaid taxes for the year 1888 in the sum of $1,197.80, and for the year 1889 in the sum of $1,590.00, and to the county in the sum of $2,713.20 for the year 1888, and $3,710.00 for the year 1889, all of the said indebtedness bearing interest from the 1st day of February of the year after the year for which the tax was levied. Complainants aver and charge that for the year 1888 the
9 defendant bank declared and paid to its shareholders a dividend of ten (10) per cent. upon its capital stock, and that for the year 1889 it declared and paid a dividend of ten (10) per cent. thereon, and complainants are advised and charge that under section 12 aforesaid (the said section having been literally re-enacted in the general assessment law of 1889), and being yet in force, the defendant bank, upon the theory that said shares of stock are taxable, is personally liable to complainants for the amounts due to them respectively from the shareholders of the defendant bank, in that the said bank has failed out of the said dividends to retain the taxes assessed upon the shareholders and to apply the same to the payment of said taxes. Complainants are not informed who are the owners of said shares of stock. They are informed that it is claimed in their behalf by the officers of the bank representing them that the said shares of stock are not taxable, and that even if taxable the assessment is void for indefiniteness and uncer-
10 tainty. To the end that complainants may fairly and properly test the question as to whether by the legal effect of the charter of the defendant corporation either the shares of stock in the hands of the stockholders or the capital stock in the hands of the bank, or both, are exempt from taxation, J. A. Omberg, cashier of said bank and the custodian of its books now and for many years heretofore, including the year 1887, is made a defendant hereto and is required in his answer to state, under oath, from the books of said defendant corporation the names of all persons, firms, or corporations owning shares of stock in said bank on the 10th day of January of each and every year and the amount held by each since and including the year 1887. It is the purpose of complainants, when the names of such shareholders shall be furnished in the manner aforesaid, to have said shares of stock assessed for each of the years aforesaid, and to bring the shareholders before the court in this proceeding by
11 such amended and supplemental pleadings as may be necessary.

Complainants do not claim that both the shares of stock in the hands of the shareholders and the capital stock in the hands of the corporation were undertaken to be taxed by the legislature of the State, but they do claim that for and since the year 1887 the revenue laws of the State provided generally that the corporate property in the hands of the corporation should not be taxed, and that the shares of stock in such corporation should be assessed and taxed to the shareholders at their market value. It was further provided by said act of 1887 and by the succeeding biennial sessions of the legislature of the State, as already appears by the quo-

tation hereinbefore made of section 14 of the act of 1887 (which section has been since continuously re-enacted), that the capital stock in the hands of the corporation should be taxed if by the charter provisions the shares of stock were not subject to taxation. Wherefore complainants desire that both the corporation and the shareholders may be brought before the court in one proceeding,

12 and that it may be there determined where the tax is validly laid on the shares of stock in the hands of the stockholders or on the capital stock in the hands of the corporation. Complainants do not concede but, on the contrary, deny that the aforesaid assessment of the shares of stock for the years 1889 and 1890 are void and invalid, and when the names of the stockholders shall have been discovered and they shall have been brought before the court the amount of tax due from each of them under said assessment will be shown and judgment prayed for against them and against the defendant company under said sec. 12 of the act of 1887.

III. Complainants are informed and charge that since the adoption by the State of Tennessee, on the 5th day of May, 1870, of the constitution of 1870, the defendant banking company has increased its capital stock from $60,000.00 to $1,000,000.00. The bank, however, claims that its increase has been made from $200,000.00. Complainants are advised and charge that the new stock subscribed and issued since the 5th day of May, 1870, whatever may be the amount thereof, and aside from all other questions, is taxable.

13 It asks that the defendant J. A. Omberg may on his oath state in his answer whether or not the capital stock of the defendant banking company has been increased since the adoption by the State of the constitution of 1870, to wit, since the 5th day of May, 1870, and that he further on oath state the amount, the date or dates of such increase of stock if it has been increased more than once since the date last aforesaid, and that from the books of the said company he may furnish a list of the persons, firms, or corporations owning shares of stock in the defendant bank on the 10th day of January of each year since and including the year 1887 that have been issued since the adoption of the constitution of the State on the 5th day of May, 1870. This discovery on oath is asked to the end that the shares of stock may be assessed and that the owners thereof may, by appropriate amended and supplemental pleadings, be brought before the court in this cause for the purpose of enforcing and collecting the taxes due therefrom.

Complainants further aver and charge that defendant J. T. Fargason, on the 10th day of January, 1888, was and continu-

14 ously since that time has been the owner of 1,500 or more shares of the defendant company; that, as hereinbefore stated, the total stock thereof for the year 1888 was assessed at $399,000.00, and for the year 1889 at $530,000.00; that the assessment of each share thereof was therefore $66.50 for 1888 and $88.33⅓ for 1889; that if it be held that said shares are taxable and taxed the taxes due thereon to the State for the year 1888 is the sum of $299.25,

and for the year 1889 the sum of $397.50, and to the complainant county the sum of $678.30 for the year 1888 and $698.25 for the year 1889; said defendant therefore, if it be held that said shares are taxable and taxed, is personally indebted to complainants respectively in the sums aforesaid, with interest upon each year's taxes from the 1st day of February of the year succeeding the year for which they were levied, and personal judgment is accordingly prayed for against him, together with the enforcement of any liens fixed by law on said stock as security for the payment of
15 taxes laid thereon. Complainants further state that under the general revenue laws of the State they are respectively entitled to recover 10% upon the taxes and interest thereon that may be adjudged due to them as compensation to their agent and attorney, C. Weatherford.

Complainants aver that by the statute laws of the State of Tennessee they respectively have liens upon the capital stock of said bank and upon any property in which the same may be invested for the payment of any sums that may be adjudged due from defendant bank on account of taxes laid on said capital stock and liens upon the shares of stock in said bank for any taxes upon said shares that may be adjudged due thereon. Complainants further state and show that the defendant claims that under and by virtue of the terms of its charter both its shares of stock and its capital stock are exempt from taxation, excepting only one-half of one per cent. prescribed by the charter, and that the revenue law of the
16 State, undertaking to tax the one or the other, is void because in violation of that clause of the Constitution of the United States which forbids the State to pass any law impairing the obligation of a contract. It claims immunity from taxation upon that ground and upon none other. The case is therefore one arising under the Constitution of the United States and within the jurisdiction of this court, this bill being brought to obtain an adjudication of the question of the exemption of the shares of stock or of the capital stock, or both, of the defendant bank.

Prayer.

Premises considered, complainants pray that the parties named as such in the caption be made defendants hereto; that subpœna and copy issue, returnable to the next proper rule day, according to the practice of the court, requiring them to appear and answer the allegations of this bill, the defendant J. A. Omberg answering under oath and making discovery as asked in the body of the bill;
17 that the court will pass upon the claim of immunity from taxation set up by defendant company and its stockholders, adjudging the liability of the one or the other, or both, to taxation, determining upon which the taxes are laid for the several years mentioned in the bill, rendering judgment accordingly, and enforcing the liens given by the statute laws of the State; and that the

court will grant such further relief, general or special, as the complainants in equity ought to have.

C. WEATHERFORD,
Solicitor for State and County.

METCALF & WALKER, *Of Counsel.*

18 EXHIBIT A TO BILL. Filed January 26, 1893.

CHAPTER 128.

An act to incorporate the Gayoso Savings Institution and the Chattanooga Savings Institute.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That Jesse E. Maxwell, A. D. Witherspoon, A. J. White, William E. Milton and Gabriel Smither, and their associates and successors, be, and they are hereby created a body politic and corporate, by the name and style of the Gayoso Savings Institution, and by that name shall have succession, sue and be sued; plead and be impleaded; and generally to do every act and thing necessary to carry out the provisions of the act, and promote the object and design of this corporation.

SEC. 2. Be it further enacted, That the capital stock of said company shall be divided into shares of fifty dollars each, and when two hundred shares shall have been subscribed, and the sum of one dollar per share paid thereon, the stockholders may meet and elect five directors, who shall be elected, and enter upon their duties; and said directors shall elect one of their number to be president during their term of office.

SEC. 3. Be it further enacted, That said president and directors shall and may adopt and use a common seal, and alter the same at pleasure; may make and adopt proper and necessary by-laws for their government, may appoint all necessary officers and agents, fix their compensation, and take bond and security for the faithful discharge of their duties; they may prescribe the manner of paying in the stock; and of the transfer thereof. Said institution shall have a lien on the stock for debts due it by the stockholders, before and in preference to other creditors, except the State, for taxes; and shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes.

19 SEC. 4. Be it further enacted, That said institution may discount notes, may buy and sell stocks, deal in exchange, and gold and silver bullion; may purchase and hold a lot of ground for the use of the institution, as a place of business, and at pleasure, sell or exchange the same, and may hold such real or personal property and estate as may be conveyed to it, to secure debts due the institution, and may sell and convey the same. It may receive on deposit, any and all sums not less than one dollar per week offered as stock deposites; and infants and *femes covert* may deposite therein, and control the deposites so made, which shall be for their own separate use, free from other contracts or control

whatever; and when such deposites shall amount to fifty dollars, it may, at the option of the depositor, become stock in the institution. It may receive other general or special deposites, and allow such interest thereon as may be agreed upon, not exceeding that allowed by law; and twice per year, declare and pay to stockholders a dividend of profits. But said institution is hereby expressly prohibited from issuing notes, certificates, or other paper, for the purpose of being used, or which shall have a tendency to pass and be used, as a circulating medium.

SEC. 5. Be it further enacted, That the president and directors shall annually appoint the time and place of holding the election of their successors, and two or more of their members shall attend and conduct said election, each share being entitled to one vote.

SEC. 6. Be it further enacted, That Benjamin Chandler, Samuel R. McCamy, James Whitesides, John L. M. French, Edwin Marsh, James E. Warner, their associates and successors, be, and they are hereby, created a body politic and corporate, by the name and style of the Chattanooga Savings Institute, and by that name shall have succession; sue and be sued; plead and be impleaded; and they are hereby invested with all the powers, privileges, rights,
20 and immunities, and subjected to the same liabilities and restrictions that are given and imposed in the foregoing sections, upon the Gayoso Savings Institution. The corporation chartered by this section shall be located in the city of Chattanooga.

SEC. 7. Be it further enacted, That this act shall be in force from and after the date of its passage, and shall remain in force fifty years.

21 Know all men by these presents that we, the State of Tennessee and Shelby County therein and C. W. Metcalf & S. P. Walker, — held and firmly bound unto said defendants, The Bank of Commerce, J. A. Omberg, and J. T. Fargason, in the sum of two hundred and fifty dollars; but to be void on condition that the said defendants do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiffs in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendants, and also on failure of the said plaintiffs to prosecute the said suit with effect, and also on failure of the defendants, if convicted, to pay said costs.

Witness our hands and seals this 26th day of January, A. D. 1893.

STATE OF TENNESSEE, [L. S.]
By METCALF & WALKER, *Att'ys.*
SHELBY COUNTY, [L. S.]
By METCALF & WALKER, *Att'ys.*
METCALF & WALKER, *Sureties.* [L. S.]

Approved by and acknowledged before me the 26th day of January, A. D. 1893.

JOHN B. CLOUGH, *Clerk.*
——— ———, *D. C.*

[Endorsed:] No. 457. U. S. circuit court, western district Tennessee, western division. State of Tennessee and Shelby County *vs.* Bank of Commerce *et al.* Cost bond. C. Weatherford, Metcalf & Walker, attorneys. Filed at Memphis on the 26th day of Jan'y, A. D. 1893. J. B. Clough, clerk. —— ——, D. C.

22 UNITED STATES OF AMERICA, }
Western Division of the Western District of Tennessee. }

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1892, at the United States court-house, in the city of Memphis, in said district, on, to wit, the first day of February, A. D. 1893, in the following cause, to wit:

STATE OF TENNESSEE *et al.*, Plaintiff-,
vs.
BANK OF COMMERCE *et al.*, Defendant-. } No. 457.

Upon motion of complainants, by their solicitors, it is ordered that summons with copies thereof and of the bill herein issue, returnable to the next March rule day.

[Endorsed:] No. 457. Circuit court of the United States, western district of Tennessee. State of Tenn. *et al. vs.* Bank — Commerce *et al.* Order of court. Entered and filed 1st day of Febr'y, A. D. 1893. John B. Clough, clerk, by —— ——, deputy.

23 The President of the United States of America to the marshal of the western district of Tennessee, Greeting:

You are hereby commanded to summons the Bank of Commerce, J. A. Ormberg, and J. T. Fargason, citizen of the State of Tennessee, if to be found within your district, to appear before the circuit court of the United States, in the sixth circuit, for the western district of Tennessee, at Memphis, in said district, on the first Monday in March next, and then and there to plead, answer, or demur to the bill filed in the office of the clerk of the said court on the 26th day of January, A. D. 1893, against said defendants by the State of Tennessee and the county of Shelby, in the State of Tennessee. Herein fail not, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this first day of February, A. D. 1893, and the 117th year of American Independence.

[L. S.] JOHN B. CLOUGH, *Clerk.*
—— ——, *D. C.*

Memorandum.

The said defendants, The Bank of Commerce, J. A. Omberg, and J. T. Fargason, are required to enter appearance in this suit in the

office of the clerk of the circuit court at Memphis, Tennessee, on or before the day on which the subpœna is returnable, or the allegations of the bill herein will be taken for confessed against said defendant and judgment rendered accordingly.

JOHN B. CLOUGH, *Clerk.*
—— ——, *D. C.*

24 [Endorsed:] No. 457. Circuit court of the United States, western district of Tennessee. State of Tennessee, Shelby County, *vs.* Bank of Commerce *et al.* Summons. Issued 1st day of February, 1893. J. B. Clough, clerk. —— ——, deputy. Returnable to March rule day, A. D. 1893. Ret'd and filed 8th day of Feb'y, A. D. 1893. J. B. Clough, clerk. —— ——, D. C. C. Weatherford, Metcalf & Walker, attorneys.

Marshal's Return.

This writ came to hand on the date of its issuance, and I duly executed the same as therein commanded by making the contents thereof known to the within-named defendant, The Bank of Commerce, at Memphis, Tennessee, on the 4th day of February, A. D. 1893, and at the same time and place delivering to S. H. Dunscomb, president, a duly certified copy thereof, together with such copy of the bill in this cause; and I further executed this writ by making known the contents thereof to the defendant J. A. Omberg, at Memphis, Tennessee, on the 4th day of February, A. D. 1893, and also then and there delivering to him like copy of the same; and I further executed this writ by making known the contents thereof to the defendant J. T. Fargason, at Memphis, Tennessee, on the 4th day of February, A. D. 1893, and also then and there delivering to him like copy of the same and of the said bill.

Memphis, Tennessee, February 6th, A. D. 1893.

J. W. BROWN,
U. S. Marshal,
By R. B. FANNING, *Deputy.*

25 No. 457.

Circuit Court of the United States, Western District of Tennessee.

STATE OF TENNESSEE and COUNTY OF SHELBY *vs.* BANK OF COMMERCE, J. A. OMBERG, and J. T. FARGASON. } Demurrer. Filed Feb'y 16, 1893.

The Demurrer of the Defendants.

Come the defendants and demur to the bill of complaint filed in the above-entitled cause and court, and as cause of demurrer assign that the 14th section of chapter 2 of the Session Acts of the Tennessee General Assembly of 1887 and the act passed on the 19th of March, 1889, being chapter 4 of the Session Acts of that year, are in conflict with section 10, article 1, of the Constitution of the United

States, which ordains that no State shall pass any law impairing the obligation of contracts, and are void. Wherefore these defendants demur and pray the judgment of the court.

JULIUS A. TAYLOR AND
W. H. CARROLL,
Sol's for Demurrants.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

26 JULIUS A. TAYLOR,
Of Counsel for Defendants.

STATE OF TENNESSEE, }
County of Shelby. }

Western Division of Western District of Tennessee.

Jas. A. Omberg, being duly sworn, deposes and says: I am one of the above-named defendants. The foregoing demurrer is not interposed for delay.

J. A. OMBERG.

Sworn to and subscribed before me this 16th day of February, 1893.

W. B. WEISIGER,
D. C. U. S. Cir. C't, W. D. T.

27 UNITED STATES OF AMERICA, }
Western Division of the Western District of Tennessee. }

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1892, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 19th day of May, A. D. 1893, in the following cause, to wit:

STATE OF TENNESSEE *et al.*, Plaintiff-, }
vs. } No. 457.
BANK OF COMMERCE *et al.*, Defendant-. }

For satisfactory reasons to the court appearing, it is hereby ordered by the court that the foregoing-entitled case be, and it is hereby, continued to the next term of the court.

[Endorsed:] No. 457. Circuit court of the United States, western district of Tennessee. State of Tenn. *et al. vs.* Bank Commerce *et al.* Order of court. Entered and filed 19th day of May, A. D. 1893. John B. Clough, clerk, by —— ——, deputy.

28 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1893, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 23d day of August, A. D. 1893, in the following cause, to wit:

STATE OF TENNESSEE and COUNTY OF SHELBY, Plaintiff-,
vs.
BANK OF COMMERCE, J. A. OMBERG, and J. T. FARGASON, Defendant-. } No. 457.

Be it remembered that this cause came on to be heard on the demurrer of defendants filed herein on the 16th day of February, 1893, and, the same having been argued by counsel and considered by the court, the court is of opinion that said demurrer should be sustained. It is therefore adjudged and decreed that complainants' bill herein be dismissed at their costs, for which costs execution will issue against complainants and C. W. Metcalf and S. P. Walker, sureties on complainants' cost bond.

[Endorsed:] No. 457. Circuit court of the United States, western district of Tennessee. State of Tenn. *et al. vs.* Bank of Commerce *et al.* Order of court. Entered and filed 22d day of Aug't, A. D. 1893. John B. Clough, clerk, by —— ——, deputy.

29 Circuit Court of the United States for the Western District of Tennessee.

STATE OF TENNESSEE and COUNTY OF SHELBY
vs.
BANK OF COMMERCE, J. A. OMBERG, and J. T. FARGASON. } No. 457, Eq. Docket.

Prayer for Appeal.

Filed Sept. 22, 1893.

To the honorable the judges of the circuit court of the United States for said district:

Come again the complainants in the above-entitled cause, by their solicitors, and petition the court for an appeal to the Supreme Court of the United States from the decree entered in said cause by said circuit court on the 22nd day of August, A. D. 1893.

And your petitioners will ever pray, etc.

METCALF & WALKER,
C. WEATHERFORD,
For Complainants.

30 Circuit Court of the United States, Western District of Tennessee.

STATE OF TENNESSEE and COUNTY OF SHELBY
vs.
THE BANK OF COMMERCE, J. A. OMBERG, and T. J. FARGASON. } # 457, Eq. Docket.

Appeal Bond.

Filed Sept. 22, 1893.

Know all men by these presents that we, the State of Tennessee and County of Shelby, therein, as principals, and —— ——, as sureties, are hereby held and firmly bound unto the Bank of Commerce, J. A. Omberg, and J. T. Fargason in the sum of five hundred dollars, to be paid to the said obligees; to which payment, well and truly to be made, we and each of us bind ourselves, jointly and severally, and our and each of — successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, signed, and dated, at Memphis, Tennessee, this 22d day of September, A. D. 1893.

Whereas the above-named State and county have prosecuted an appeal to the Supreme Court of the United States to revise the decree and judgment rendered in the above-entitled cause by the circuit court of the United States within and for the western division of the said western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named complainants shall prosecute said appeal to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise remain in full force.

STATE OF TENNESSEE,
COUNTY OF SHELBY,
By S. P. WALKER, *Solicitor.*
S. P. WALKER.
C. WEATHERFORD.

Approved.
Memphis, Tennessee, September 22, A. D. 1893.
E. S. HAMMOND,
U. S. District Judge.

31 Circuit Court of the United States, Western District of Tennessee.

STATE OF TENNESSEE and COUNTY OF SHELBY
vs.
THE BANK OF COMMERCE and Others. } # 457, Eq. Docket. Decree. Entered Sept. 23, 1893.

The State of Tennessee and County of Shelby, complainants in the above-entitled cause, by their solicitors, this day appeared in open court and prayed an appeal herein to the next term of the

Supreme Court of the United States, and the said complainants having executed an appeal bond in due form, and the same having been approved by the presiding judge of this court, the said appeal is hereby granted and allowed.

The defendants, by their solicitors, being in open court at the time this appeal is allowed, waived the issuing or service of citation thereon.

32 Circuit Court of the United States, Western District of Tennessee.

STATE OF TENNESSEE and COUNTY OF SHELBY
vs.
THE BANK OF COMMERCE, J. A. OMBERG, and J. T. FARGASON. } = 457, Eq. Docket.

Assignment of Errors.

Filed Sept. 22, 1893.

The State of Tennessee and The County of Shelby say that the decree herein rendered on the 22nd day of August, A. D. 1893, is erroneous in the respects following, to wit:

I.

In that said decree sustains the demurrer of the defendants and dismisses the bill herein. The said demurrer should have been overruled.

II.

In that it is ruled and adjudged by said decree that the capital stock and franchises of the defendant The Bank of Commerce is exempt from all taxes by virtue of its charter. It should have been ruled that the charter of the defendant bank exempted only the shares of stock therein from any tax other than one-third of one per cent. stipulated to be paid under and by virtue of the charter contract.

III.

In that the said decree ruled and adjudged that the shares
33 of stock in said bank were exempt from all taxes other than stipulated to be paid by the charter. It should have been ruled that the shares of stock in said bank were subject to the taxing power of the State.

IV.

In that the court refused to rule that the State had power to tax the new or increased capital stock or shares of stock in said bank subscribed and paid in after the adoption of the constitution of the State of Tennessee on May 5th, 1870.

The court should have ruled that the constitution aforesaid annulled and repealed all power on the part of the defendant bank to

increase its capital stock and to hold the same exempt from the taxing power of the State.

The State had power to tax either the capital paid in or the shares of stock issued after the adoption of the constitution of the State on May 5th, 1870, and it should have been so ruled.

METCALF & WALKER,
C. WEATHERFORD,
For Appellants.

34 THE UNITED STATES OF AMERICA, }
Sixth Judicial Circuit, Western District of Tennessee. }

I, John B. Clough, clerk of the circuit court of the United States for the western division of said western district of Tennessee, do hereby certify that the papers hereto attached are a full, true, perfect, and correct copy of the originals and of the entire record and proceedings in said court, as the same now appears of record and upon the files in my office, in the following cause, to wit:

STATE OF TENNESSEE, COUNTY OF SHELBY
vs. } No. 457.
BANK OF COMMERCE, J. A. OMBERG, J. T. FARGASON.

In testimony whereof I have hereunto written my name and affixed the seal of said court, at my office, in the city of Memphis, Tennessee, this 22d day of September, A. D. 1893, and of the Independence of the United States the 118th year.

{ Seal Circuit Court of the United States for the Western Division of the Western District of Tennessee. }

JOHN B. CLOUGH, *Clerk.*

Authentication.

I, E. S. Hammond, a judge of said court, do hereby certify that John B. Clough, whose genuine signature appears to the foregoing certificate, is and was at the date of the same clerk of said court, and that his attestation is in due form.

E. S. HAMMOND,
Judge of the District Courts of the United States for the District Aforesaid.

[Endorsed:] No. 457. Circuit court of the United States, western district of Tennessee. State of Tennessee, County of Shelby *vs.* Bank of Commerce, J. A. Omberg, J. T. Fargason.

Endorsed on cover: Case No. 15,405. W. Tennessee C. C. U. S. Term No., 1021. The State of Tennessee and The County of Shelby, appellants, *vs.* The Bank of Commerce, J. A. Omberg, and J. T. Fargason. Filed September 28th, 1893.

Office Supreme Court, U. S.
FILED
JAN 15 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 761.

STATE OF TENNESSEE, FOR THE USE OF THE CITY OF MEMPHIS, AND THE CITY OF MEMPHIS, APPELLANTS,

vs.

THE BANK OF COMMERCE ET AL.

This case is by order of the Court advanced, and by stipulation of counsel is to be disposed of on the brief and argument submitted in No. 1021, State, etc., *vs.* Bank of Commerce. The two cases are identical, except that in No. 761 the bill was filed in the State chancery court and *was removed* into the Federal court by the defendant bank, and in No. 1021 an original bill was filed by the State against the bank in the Federal court.

The cases therefore differ, if at all, solely on the jurisdictional question.

S. P. WALKER,
For Appellants.

Office Supreme Court U. S.
FILED.
JAN 5 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1893.

No. 1020.

STATE OF TENNESSEE, AND
COUNTY OF SHELBY,
APPELLANTS,

vs.

THE UNION & PLANTERS BANK, ET AL.

BRIEF FOR APPELLANTS.

C. W. METCALF,
S. P. WALKER,
OF COUNSEL.

A. G. ROOF & CO., PRINTERS & BINDERS, MEMPHIS.

In the Supreme Court of the United States.

OCTOBER TERM. 1893.

No. 1020.

STATE OF TENNESSEE AND COUNTY OF SHELBY

vs. } No.

UNION & PLANTERS BANK AND OTHERS.

Statement, Assignment of Errors, Brief and Argument

FOR APPELLANTS.

STATEMENT.

The bill in this case was filed by the State of Tennessee and county of Shelby against the Union and Planters Bank, its cashier, S. P. Read, and W. A. Williamson, the latter being a stockholder in the defendant bank to the amount of $150,000, for the purpose of collecting certain taxes alleged to be due to the State and county under the general revenue laws of the State, and especially under section 18 of the act of 1887, re-enacted by the general revenue laws of 1889 and 1891. The stated question in the case—that upon which the decree below dismissing complainants' bill was founded—arose upon that clause of the charter of the defendant company by which it was provided that "said company shall pay to the State of Tennessee an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes."

The theory of the bill is that the commuted charter tax of one-half of one per cent. is laid on the shares of stock, and that the words "which shall be in lieu of all other taxes" exempt only the shares of stock, and do not exempt the capital stock or franchises of the corporation.

It was determined by this court, upon this very same charter, in the case of *Farrington v. The State*, 95 U. S. 679, that the exemption above quoted applied to the shares of stock as property in the hands of the shareholders; and the question to be determined upon the present record is, whether that exemption will be extended also to the capital stock and franchises of the corporation.

The trial court was of opinion that under the exemption clause of the charter above quoted, the capital stock and franchises, as well as the shares of stock, were exempt, and accordingly dismissed the bill.

Two other questions—one of *res judicata*, and the other of the jurisdiction of the court below—were made, and will be noticed in the progress of the argument. The question of charter exemption, however, having been determined by the trial court in favor of the contention of the defendant, that of *res judicata* became immaterial, and was not decided by the trial court at all.

The court below having disposed of the case on the merits, of course determined the question of jurisdiction in favor of the complainants.

The bill is framed, primarily, upon the theory that the shares of stock are exempt, but the capital stock and franchises are taxable; but it is also framed, in the alternative, to reach the shares of stock, in the event the court should hold that the charter tax and charter exemption applied to the capital stock, and not to the shares. To meet the latter altern-

ative, Williamson, a shareholder, was made defendant to the bill, and the cashier, Read, was also made defendant—the bill praying that he might be required to discover on oath the names of the shareholders and the amounts of their respective holdings, to the end that such other shareholders might also be made defendants and proper relief had against them, in that alternative.

ASSIGNMENT OF ERRORS.

Appellants assign errors in the decree below, in the respects following, towit:

I.

In that it was adjudged by said decree that by the charter of the defendant bank both the capital stock of said bank and the shares of stock therein are exempt from taxation.

II.

In that it is adjudged by said decree that the capital stock and franchises of the defendant bank are exempt from all taxes by virtue of its charter. It should have been ruled that the charter of the defendant bank exempted only the shares of stock therein from any tax other than the one-half of one per cent. fixed by the charter.

III.

In that it was adjudged by said decree that the shares of stock in said bank were exempt from all taxes other than the one-half of one per cent. fixed by the charter. It being ruled that the capital stock was exempt by virtue of the charter of the defendant bank, it should have been ruled that the shares of stock were not exempt; or it being ruled that the shares of stock were thereby exempt, it should have been ruled that the capital stock was not exempt. In no event should it have been ruled that both the capital stock and the shares of stock were exempt.

BRIEF.

I.

The only effect of the charter of the defendant bank is to exempt the shareholders, as persons, from taxation on account of their shares of stock therein. The charter tax is laid upon the shares of stock, and the words "in lieu of all other taxes," mean, in lieu of all other taxes *upon the same subject of taxation*, towit, the shares of stock. There is no exemption, expressed or implied, of the capital stock or franchises of the corporation.

Farrington v. State, 95 U. S. 679.
State v. Whitworth, 22 Fed. Rep. 80.
State v. Whitworth, 177 U. S. 136.
New Orleans v. Houston, 119 U. S. 265.
Van Allen v. Assessors, 3 Wall. 573.
People v. Commissioners, 4 Wall. 244.
Jones Mfg. Co. v. Commonwealth, 69 Pa. St. 137.
Cooley on Taxation (ed. 1886) 231.
Union Bank v. State, 9 Yerg. 490.
Memphis v. Farrington, 8 Bax. 539.

II.

The capital stock and the shares of stock are distinct subjects of taxation, and in the absence of a charter or contract exemption the State would have had the undoubted power to tax both the capital stock and the shares of stock.

Union Bank v. The State, 9 Yerg. 490.
Memphis v. Ensley, 6 Bax. 553.
Nashville Gaslight Co. v. Nashville, 8 Lea 407.
Street R. R. Co. v. Morrow, 3 Pickle 406.
Farrington v. State, 95 U. S. 679.
New Orleans v. Houston, 119 U. S. 277.
Cooley on Taxation, sec. 231.

The power to tax both the capital stock and the shares of stock, in the absence of charter exemption, being undoubted, it must be adjudged that the power, as to both subjects of taxation, remained unimpaired, except to the extent that it appears in unmistakable terms to have been surrendered.

Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416.
Delaware R. R. Tax, 18 Wall. 225.
Erie Ry. Co. v. Pa., 21 Wall. 498.
Tucker v. Ferguson, 21 Wall. 575.
Farrington v. Tenn., 95 U. S. 686.
Tenn. v. Whitworth, 117 U. S. 136.

III.

The plea of *res judicata*, embodied in the answer, cannot be sustained in behalf either of the corporation or the shareholders. So far as concerns the corporation the case of *Farrington v. State*, *supra*, is unavailable, for the reason that the corporation was not a party to the case. Under the then legislation of the State, the tax was laid solely upon the shares of stock. There was no law taxing the capital stock or franchises. The case therefore, did not involve and could not have involved (except, perhaps, argumentatively) the power of the State so to do.

Whether available to the shareholders or not, we do not discuss, inasmuch as appellants are willing to admit the exemption of the shares of stock, and by the frame of the bill sought to bring both the shareholders and the corporation before the court in one proceeding, to the end that if the court should, of its own motion, hold the shares taxable and the capital stock exempt, the pleadings would be in proper form to meet that result.

The decree pronounced by the Supreme Court of Tennessee in the case of *Memphis v. The Union and Planters Bank*, 7 Pickle 546, is not available as *res judicata* either to the share-

holders or the corporation, because, (1) that bill was brought by the municipality, the State being a nominal party only; (2) because the county was not a party to that proceeding, either nominally or otherwise; (3) the taxes here sued for are not the same as were sued for in that case—that bill being brought for the recovery of city taxes and this for the recovery of State and county taxes. The case is of weight as a precedent only; it has not the conclusive force of a judgment against these appellants.

Tenn. Code (M. & V.) sec. 3492.
St. Paul & S. C. R. R. Co. v. Robinson, 40 Minn. 360.
Burton v. Dees, 4 Yerg. 7.

IV.

The tax law of the State is not in conflict with the Constitution of the State or with just general principles of the laws of taxation.

The Mercantile Bank v. N. Y., 121 U. S. 138–160.
Oswego v. Dollaway, 21 N. Y. 449.
People v. Commissioners, 95 N. Y. 554.
Lionberger v. Rouse, 9 Wall. 468.

The capital stock, if taxable, cannot claim the benefit, by way of credit, of the charter tax laid on the shares. If it could, however, the remedy would lie in allowing the credit, not in avoiding, or annulling the revenue law of the State.

Supervisors v. Stanley, 105 U. S. 305.
Evansville Bank v. Britton, 105 U. S. 322.

V.

The original jurisdiction of the court below cannot be successfully denied.

By section 1 of the judiciary act of 1888 the Circuit Court has original jurisdiction of any suit of a civil nature, etc.,

" arising under the Constitution or laws of the United States." The same language is used in the 2d section, regulating the removal of cases from the State courts.

The bill alleges, and the answer admits, that the State claims the right to tax, and has taxed the capital stock, or, in the alternative, the shares of stock of the defendant company—that the defendants claim an irrepealable charter exemption of both capital stock and shares of stock, and that the legislation of the State taxing either the one or the other is in conflict with the clause of the Constitution of the United States which forbids the States from passing any law impairing the obligation of a contract, and void. The defendant does rely, for the protection of its alleged immunity, upon the Federal Constitution ; and the Circuit Court had jurisdiction, notwithstanding other defenses were made.

Osborn v. Bank of U. S., 9 Wh. 823.
Tenn. v. Whitworth, 117 U. S. 129.
N. O. v. Houston, 119 U. S. 265.
R. R. Co. v. Miss., 102 U. S. 141.
Cook v. Avery, 147 U. S. 386.
Mayor v. Cooper, 6 Wall. 251–2.

ARGUMENT IN SUPPORT OF THE BILL.

We shall first present the general question of the power of the State under a charter such as that above quoted, to tax the capital stock and franchises of the corporation, and shall thereafter notice such special questions as arise upon the record.

As already stated, the question to be determined is whether the clause aforesaid exempts the franchise and the capital stock of the defendant bank, as well as the shareholders therein, taking it to be settled by the decision in *Farrington v. Tenn.*, 95 U. S. 679, that the clause does exempt the shares of stock in the hands of the stockholders.

We will look at the question, first, in the light of the decisions of the Federal courts—the leading case being that of *Farrington v. Tenn., supra.*

That case is relied upon as decisive for defendants of the question here involved. We submit, however—

1st. That the question here presented not only was not, but could not, have been there decided. The case arose under the general revenue legislation of the State, by which it was enacted, that the capital stock and properties of the corporation should not be taxed, but that the taxes should be laid on the shares of stock in the hands of the stockholders, and the sole question presented for judgment was whether said shares of stock could be taxed under such a charter.

2nd. Aside from that, we submit that every fair implication from the decision is in favor of the power of the State to tax the capital stock and franchises of the bank, notwithstanding the exemption clause of the charter.

The court, among other things, said:

"Can the exemption here in question, examined by the light of these rules, be held valid? Upon looking into the section, several things clearly appear—

"1st. *The tax specified is upon each share of capital stock*, and *not upon the capital stock itself.* 2. It is upon each share *subscribed.* Nothing is said about what is paid upon it; that is immaterial. The fact of subscription is the test, and that alone is sufficient. 3. This tax is declared to be 'in lieu of all other taxes.' Such was the contract of the parties.

"The capital stock, and the shares of the capital stock, are distinct things. The capital stock is the money paid or authorized, or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. It represents whatever it may be invested in. * * *It is sub-*

ject to taxation like other property. * * The shares of the capital stock are usually represented by certificates. Every holder is a *cestui que trust* to the extent of his ownership. The shares are held, and may be bought and sold like other property. Each share represents an aliquot part of the capital stock; but the holder cannot touch a dollar of the principal. He is entitled only to share in the dividends and profits. Upon the dissolution of the institution, each shareholder is entitled to a proportionate share of the residuum after satisfying all liabilities. * * * *The capital stock and the shares may both be taxed, and it is not double taxation.*

"There is no question before us as to the tax imposed on the shares by the charter. But the State has, by her revenue law, imposed another and an additional tax *on these same shares.* This is another one of those 'other taxes' which it had stipulated to forego. *The identity of the thing doubly taxed* is not affected by the fact that, in one case, the tax is to be paid *vicariously* by the bank, and in the other by the owner of the share himself. The thing thus taxed is still the same, and *the second tax is expressly forbidden by the contract of the parties.*

"The *Union Bank v. The State*, 9 Yerg. (Tenn.) 490, is a case marked by eminent judicial ability and careful thought. There it was stipulated 'that, in consideration of the privileges granted by this charter, the bank agrees to pay to the State annually the one-half of one per cent. on the amount of the capital stock paid in by the stockholders other than the State.' It was held that a further tax on the capital stock was void, but that the State might tax the shares in the hands of the individuals.

"In the case before us, *the charter tax is upon the shares.* The tax complained of is a further tax on those shares. Without the phrase 'in lieu of all other taxes,' the parallelism is complete. A further tax could no more be imposed upon the

shares in one case than upon the capital stock in the other. The same negative considerations apply to both."

It is plain, as we submit from the reading of the whole opinion, that the majority of the court held that the charter tax was itself a tax upon the shares of stock; and, making the relative correspond exactly with the antecedent, it reached the conclusion that the words "in lieu of all other taxes" necessarily meant in lieu of all other taxes *on the shares.*

This is most strikingly shown by the passage of the opinion referring to the 9th Yerger case. In that case the court held that a charter tax on the capital stock *by implication* exempted the capital stock from further taxation, *but did not exempt the shares.* Here there was an express exemption, the question being whether that exemption was applicable to the shares of stock; and this court, first deciding that the charter tax was on the shares, held that the exemption was of the shares, saying that, between the two cases, "the parallelism was complete," and approving the principle upon which the 9th Yerger case was decided—viz., that the exemption must be applied to the same subject of taxation that is taxed by the charter.

The meaning of the court is further manifested by the emphasis laid upon the fact that the charter tax was one-half of one per cent. upon the stock *subscribed*, whether paid in or not, fortifying thus its conclusion that the charter tax was on, and the charter exemption of, the shares.

The Farrington case has been twice adverted to in the decisions of the Federal courts, and construed as we construe it.

In the case of *The State of Tenn. v. Whitworth*, 22 Fed. Rep. 80, Matthews, J., in his opinion, said:

"This conclusion seems to be required by the decision of the Supreme Court of the United States in the case of *Far-*

rington v. Tennessee, 95 U. S. 679. In that case the bank charter provided that the bank 'shall pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes.' *It was held that the words 'in lieu of all other taxes' as thus used, meant in lieu of all other taxes that might be imposed on that subject of taxation — viz., the shares of the capital stock;* and that, accordingly, it excluded a tax on those shares assessed upon them against the individual shareholder as his property."

Again, when that case came to be heard on appeal, this court said:

"In *Farrington v. Tennessee*, 95 U. S. 679, the charter of the Union & Planters Bank provided that 'said company shall pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes,' and the question was whether this exempted the shares in the hands of the stockholders from any further taxation by the State. The court—three justices dissenting—held that it did, *because, as the charter tax was laid on each share subscribed, the further exemption must necessarily have been of the shares in the hands of the stockholders*, although the tax as imposed was payable by the corporation. In all cases of this kind the question is as to the intent of the Legislature—the presumption always being against surrender of the taxing power."

State of Tennessee v. Whitworth, 117 U. S. 136.

In the latter case the opinion was delivered by Chief Justice Waite. He was with the majority in the case of *Farrington v. The State;* and his construction, therefore, of the last-named case is probably entitled to more than ordinary weight.

The question again, but incidentally, came under review in the case of *New Orleans v. Houston*, 119 U. S. 265.

The Louisiana Lottery Company, by its charter, was required to pay to the State $40,000 *per annum*, and was thereupon declared exempt from all other taxes or licenses whatsoever. By a subsequent general revenue law of the State, it was enacted, in substance, that no tax assessment should thereafter be made upon the capital stock of any corporation, etc., but that the shares should be assessed to the shareholders; and it was made the duty of the corporation to pay the taxes so assessed. It was further provided that the value of certain property to be assessed directly to the corporation under sections 1 and 3 of the act, and also the value of all exempted property, should be deducted in ascertaining the value of the shares of stock.

Under this legislation it was held—Matthews, J., delivering the opinion—that the tax as laid by the general revenue law was, in substance and legal effect, a tax upon the corporation, mainly upon the ground that the corporation was obliged, primarily, to pay it, regardless of dividends or earnings; and it was held, in consequence, that the revenue law was void, for the reason that the tax, though nominally a tax upon the shareholders, was in reality a tax upon the corporation. The opinion upon the points here involved commences on page 277, and runs to its end.

It is quite manifest, we submit, that, if an exemption of the corporation itself and its capital stock could have afforded an immunity from taxation to the shareholders, the argument would have been ended in three lines. The court would not, in that view, have proceeded with so much elaboration and care (for there would have been no necessity for it) to show that the general tax was not what it purported to be—a tax upon the shareholders—but was in reality a tax upon the corporation.

The argument on this point is prefixed by the statement that "it is well settled by the decisions of this court, that "the property of shareholders in their shares, and the prop- "erty of the corporation in its capital stock, are distinct "property interests; and, where that is the legislative intent, "clearly expressed, both may be taxed," citing, among other cases, *Farrington v. Tennessee*, 95 U. S. 679. The court proceeds then to show that the general tax, nominally on the shares of stock, was really on the corporation — the whole argument affording the clear implication that exemption of the corporation did not exempt the shares of stock.

The next case to be noticed is that of the *Bank v. Tennessee*, 104 U. S. 493.

That case reviewed and affirmed the decision of the Supreme Court of Tennessee in *Bank of Commerce v. McGowan*, 6 Lea 703.

The Supreme Court of Tennessee held that so much of the banking house of the defendant company, as was not used for banking purposes, and three other pieces of realty bought in by the bank on foreclosure of mortgages held by it, were subject to taxation, notwithstanding the charter exemption. The bank sued out a writ of error with a view to reverse so much of the State Supreme Court decision as held any part of its property subject to taxation.

Of course, so much of the decree of the Supreme Court of Tennessee as held the bank building, so far as used for banking purposes, non-taxable, was not subject to review under the writ of error sued out by the bank for the reasons—(1) that the bank alone complained of the decree below; (2) and, the decree below having been in favor of the bank to that extent, no review of the decision on that point was possible—the judiciary act allowing a writ of error only in favor of the

party who had unsuccessfully claimed the protection of the Federal Constitution in the State court.

The case, therefore, must be read in the light of the fact that the decision of the State court, so far as in favor of the bank, was conclusive, and not under review in this court.

In further support of our position, we cite the case of *Van Allen v. The Assessors*, 3 Wall. 573.

That case has been repeatedly cited and reaffirmed by this court.

It was there held that, under the act of Congress, it was competent to the State to tax the shares of stock in the national banks in the same manner as other moneyed capital was taxed, without deduction or abatement because of the fact that the capital stock of the bank was invested in United States exempt securities; and that the act thus construed was not unconstitutional. We cite the case as illustrating the proposition that the capital stock of the corporation, and the shares of stock therein, are distinct and separate subjects of taxation, and that the exemption of the one does not by implication apply to or protect the other.

In the case of *People v. The Commissioners*, 4 Wall 244, two cases were presented and determined together.—One of them involved the question of taxing shares of stock in the national banks; the other, shares in the Corn Exchange Bank, *incorporated under the laws of the State of New York.* In respect to the case of Mead (the shareholder in the latter bank), the same line of argument was pursued that is here advanced for the defendant. It was urged that the United States securities, in which the capital of the bank was invested, were within the provision of the act of Congress (14th Stat. at Large 346), enacting that such securities, "whether held by individuals, corporations or associations, shall be exempt from taxation by

or under State authority;" that the capital of the bank could not be taxed upon any measure or computation of its value which included such securities (citing *Bank of Commerce v. Commissioners*, 2 Black 620, and *The Bank Tax Case*, 2 Wall. 200); and that a tax, incompetent to the State when assessed to the corporation, and upon its capital in bulk, was also incompetent to it when assessed upon the shares of stock. The court answered the argument by reiterating the proposition announced in *Van Allen v. The Assessors*, 3 Wall. 573, that "the tax on the shares is not a tax on the capital of the bank;" that the interest of the stockholders "is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him, and subject to like taxation." Counsel for defendant say, in answer to the decision in respect to taxing shares in the national banks, that the tax was expressly authorized by Congress, subject to the limitations imposed by it; and there was properly an end of the matter. But that answer cannot be made to the decision in the 4th Wall. case, supra, so far as the case of Mead was concerned. As to his case, the single issue presented was, *whether an exemption of the capital stock would, by implication, exempt the shares of stock, and it was answered in the negative.*

"A tax on the shares of stockholders in the corporation is a different thing from the tax on the corporation itself, or its stock, and may be laid, irrespective of any taxation on the corporation, when no contract relations forbid."

Cooley on Taxation (ed. 1886) 231.

"A corporation, required to pay a bonus on its capital stock in lieu of a tax on *dividends*, may nevertheless be taxed on its net earnings or stock — these not being the same thing as dividends."

Jones Manfg. Co. v. Commonwealth, 69 Pa. St. 137.

Before reviewing the decisions of the Supreme Court of Tennessee on the question in hand, we submit the general observation that, down to the decision of the Supreme Court of the United States in *Farrington v. The State*, that court uniformly held that the charter tax was on the capital stock, and that the exemption was of the capital stock; holding that the exemption was not applicable both to the capital stock and the shares of stock in the hands of the stockholders, and that the latter were taxable.

The decisions of that court, thus holding the corporate franchises and property to be exempt, and those of this court holding the shares of stock in the hands of the stockholders to be exempt, may be put together, and thus, apparently, make a formidable array of opinions to the effect that both are exempt; but we submit that such a course of reasoning is manifestly illogical and fallacious. Of course, the decision of this court must be taken as conclusive of the proposition that the shares of stock are not taxable; but that decision having been rendered in reversal of the State court's decision to the opposite effect—the State court holding that the capital stock and franchises were exempt, and that the shares of stock were not exempt—it is not logically competent to the defendants to say that that branch of the State court's decision, holding the capital stock exempt, must be adhered to, now that the decision in its other branch—towit, the power to tax the shares—has been reversed.

With this general observation we proceed to present a brief abstract of the decisions of that court bearing upon the question.

The first case on the subject is that of the *Union Bank v. State*, 9 Yerg. 490.

The tax there in question was both on the capital stock and on the shares of stock of the Union Bank. The bank charter

provided that the company should pay to the State annually one-half of one per cent. on the amount of capital stock paid in by the shareholders.

It was held:

1st. That the agreed annual payment of one-half of one per cent. was the price of the franchise and forbade any other tax thereon.

2d. That *the capital stock was exempt*, by implication from the exemption of the franchise.

3d. That the shares of stock were not exempt, *the exemption by implication not extending to them.*

4th. That the tax there in question could not be enforced against resident owners of shares, because they were assessed at cost, and not according to value, as required by the State Constitution; nor against non-resident owners, even if properly assessed. We state this case particularly for the reason that it was decided in the year 1836, and *stood as the unquestioned law of the State of Tennessee during all the period of the passage of the charters here under consideration.* It established that the capital stock in the hands of the corporation and the shares of the stockholders *are distinct subjects of taxation;* that in the absence of any charter or contract exemption it would be competent for the State to tax both; and, as the corollary of that proposition, it holds that *an exemption of the capital stock would not be extended by implication to an exemption of the shares of stock.* To this point it was cited in the case of *Farrington v. The State*, the court there using it to illustrate the argument, that the case it was dealing with involved a charter tax on the shares of stock, and therefore forbade any further taxation on such shares; just as in the 9th Yerg. case, the court held that the charter tax was a tax on the corporation, and by implication forbade any further tax on the corporation.

If it be true that an exemption, express or implied, on the capital stock will not be extended by implication to the shares of stock, it is also and necessarily true that an exemption of the shares of stock, express or implied, will not be extended by implication to the capital stock or the franchises of the corporation.

The expression, "in lieu of all other taxes," is clearly elliptical. The defendant insists that it must be read as meaning "in lieu of all other taxes on *the corporation or its shareholders.*" We submit that, adhering to the Farrington decision, it should be read, in lieu of all other taxes *on the shareholders.*

The next prominent case on the subject is that of *City of Memphis v. Hernando Ins.*, 6 Bax. 527.

In that case it was held that the charters there involved—some of which contained express exemptions in connection with the charter bonus or tax, and others (like the Union Bank case, 9th Yerg.) contained a provision, without more, for a charter bonus or tax—protected the corporation from a further tax *upon their respective franchises.*

So far as concerns the present argument the case is explicable upon the ground that it was decided before the case of *Farrington v. The State*, and simply illustrates the general observation already made, that the Supreme Court of the State, when left to its own judgment in the matter, has always held that the exemptions in question protected the corporation and its properties, but did not protect the shares of stock.

The next case to be noticed is that of *Memphis v. Farrington*, 8 Baxter 539.

That is the case that was afterward reviewed in this court in the case of *Farrington v. The State*, 95 U. S. 679.

The Supreme Court of Tennessee there held that the capital stock and the shares of stock were distinct properties (that proposition being also distinctly affirmed in 95 U. S.); that the charter tax was on, and the charter exemption of, the capital stock; that the exemption of the one did not exempt the other; and that taxation of the shares of stock did not violate the charter exemption of the capital stock. There was no difference between the Supreme Court of the State and the Supreme Court of the United States on the proposition that *the charter tax and the exemption must be applied to the same subject of taxation.* The whole difference arose upon the question, whether the charter tax was a tax upon the capital stock or upon the shareholders—the State court holding the former and this court the latter, but both courts agreeing that the corporation or the shareholders should be held exempt, according as the charter tax should be held to be on the one or on the other.

The next cases to be noticed are those of *The Bank of Commerce v. McGowan*, 6 Lea 703; *State v. Butler and U. and P. Bank*, 13 Lea 400.

In the first of these cases it was held that the bank building occupied by the Bank of Commerce was exempt only in so far as it was occupied and used for banking purposes. The court cited and followed the case of the *DeSoto Bank v. Memphis* (6 Bax. 415), decided before the decision of the Farrington case in this court. In the second of the above cases the fact appearing that the whole of the bank building was occupied and used for banking purposes, the whole of it was held to be exempt. We concede that in the Bank of Commerce case (6 Lea, *supra*,) Judge Cooper delivering the opinion of the court, construed the 95th U. S. case as holding that both the capital stock and the shares of stock were exempt—a construction of the case, as we submit, that is manifestly errone-

ous—that case being absolutely destitute of anything like a question touching the power of the State to tax the capital stock, and every implication from the opinion being, as we have already submitted, in favor of the power of the State to tax the capital stock, notwithstanding the charter exemption.

The last case to be noticed in the Supreme Court of Tennessee is that of *Memphis v. The Union and Planters Bank*, 7 Pickle 546.

In that case the court, after reviewing the decisions in Tennessee, and that of *Farrington v. Tennessee*, 95 U. S. 679, and after stating that in the last mentioned case the corporation was not before the court, and that the only question for decision was upon the power to tax the shares of stock, and after citing the language of Mr. J. Matthews, from the case of *Tennessee v. Whitworth*, 22 Fed. Rep., *supra*, and that of this court in the same case, reported in 117 U. S., said: "Since the decision of the Farrington case by the Supreme Court of the United States, this court has uniformly adhered to its previous holding that no *ad valorem* tax can lawfully be laid on the capital stock, and, in recognition of that decision, has gone further and *said* that the shares of stock are likewise exempt from other taxation than that prescribed in the charter. *Bank of Commerce v. McGowan*, 6 Lea 705; *State v. Butler*, 13 Lea 406; *State v. Butler*, 2 Pickle 633.

"After citing with approbation the case of *DeSoto Bank v. City of Memphis*, 6 Bax. 415, and following the controlling authority of *Farrington v. Tenn.*, 95 U. S. 676, this court in its reference to the latter case said: 'The provision in question will therefore protect the capital stock and the shares of stock from any taxation beyond that prescribed in the charter. *Bank of Commerce v. McGowan*, 6 Lea 705.'"

The court then, after stating the case last above cited, and noticing the affirmance of that case in *Bank v. Tenn.*, 104 U.

S. 493, and after stating that the question of the exemption of the capital stock was not, and could not have been a point for decision in this court, nevertheless concluded that under the cases of *Farrington v. Tenn.*, 95 U. S., and the *Bank v. Tenn.*, 104 U. S., the court was constrained to hold that the charter afforded protection both to the capital stock and the shares of stock, the court finally saying: "As an original question we would hold, as held by this court in *Memphis v. Farrington*, 8 Bax. 539, and charge the stockholders with an *ad valorem* tax; but upon authority we hold as stated above.

"This court has never *decided*, and in the absence of the ruling of the Supreme Court of the United States in *Farrington v. Tenn.*, 95 U. S. 679, would not now decide that the charter gives the owners of shares of stock any immunity or exemption from taxation *on the shares*. That question is now adjudged alone upon the authority of that case. It did not arise, and was not adjudged in *Bank of Commerce v. McGowan*, 6 Lea 705; in *State v. Butler*, 13 Lea 406; or in *State v. Butler*, 2 Pickle 633."

The court near the opening of its opinion had said: "Capital stock and shares of stock are separate and distinct property interests, and form separate and distinct subjects of taxation. *The assessment or exemption of one is not an assessment or exemption of the other.* The assessment of both is not double taxation. *New Orleans v. Houston*, 119 U. S. 277; 117 U. S. 135; 95 U. S. 687; Cooley on Taxation, 231; *Union Bank v. State*, 9 Yerger 490; *Street R. R. v. Morrow*, 3 Pickle 406; *City of Memphis v. Ensley*, 6 Bax. 553; *Nashville Gaslight Co. v. City of Nashville*, 8 Lea 406:"

The fundamental error, as we submit, of this opinion is—the bill in that case, as in this, having been filed to reach either the capital stock or the shares of stock, as the one or the other might be deemed subject to taxation—that it right-

fully followed the Farrington case, 95 U. S., so far as concerned the power to tax the shares of stock, but that, coming to the question of taxing the capital stock, it felt constrained by the case of *Bank v. Tenn.*, 104 U. S. to hold that the capital stock was also exempt. As we have endeavored to show, it was under no such constraint—*this court* being, on the contrary, obliged, in the 104 U. S. case, to accept the decision of *the Supreme Court of Tennessee* in respect of the exemption of the capital stock, and having before it, on the writ of error, sued out by the bank, only the question of the exemption of the property held by the bank for other than banking purposes.

The foundation error of the three decisions in the State court to the effect that the capital stock was exempt, lies in a total misapprehension of the decisions of this court, and in its mistaken effort to follow those decisions. Left to its own judgment, that court, as stated in the 7 Pickle case, *supra*, has never held both the shares of stock and the capital stock exempt. It has so ruled in obedience simply to what it erroneously conceived to be the decision of this court; and when brought to its last analysis, it will be found that the case in 7 Pickle turns solely upon the supposed ruling of this court, as to the capital stock, in the case of the *Bank v. Tennessee*, 104 U. S., that decision in no way, as we submit, supporting the conclusion reached.

Logically, either of two conclusions was open to the Supreme Court of Tennessee when deciding the 7 Pickle case; (1) it might have adhered to its own judgment as announced in the 8 Baxter case, and reannounced in the 7th Pickle case, to the effect that the shares of stock were taxable, rendered a decree to that effect, and allowed the question to come by writ of error to this court, under a bill to which both the corporation and the shareholders were, in legal effect,

parties, and have thus allowed this court to determine, what it has never yet determined, the question whether both the capital stock and the shares of stock were exempt; or, (2) it might (and, as we submit, should) have yielded, in obedience to the Farrington case, 95 U. S., its own opinion that the shares of stock were exempt, but, adhering to the opinion of *both courts* that the exemption must be confined to the subject of charter taxation, have held that the capital stock was not exempt. The result of all the decisions was clearly and correctly stated by his Honor, Judge Hammond, in the following passage of his opinion:

"Each side claims, with great earnestness and force of argument, that this question between them has been settled by the adjudications. The bank claims, at least in one of the several cases we are trying, that the decisions have technically all the force of the principle of *res judicata*, and the adjudications have been relied on, the facts being apparent from the bill, to that extent. All that has been said heretofore would have been uselessly, if not impertinently, said if I were of that opinion. *Not one of these decisions has, in my judgment, stripped to its bare technical proportions as an adjudication, decided this question.* Counsel for the State very properly says that the bank cannot rely, first, on the overruled decisions of the Supreme Court of the State that this was a tax upon the corporate property and only an exemption of the corporation itself, and never an exemption of the shareholder, to protect it against further taxation of the corporation; and secondly, upon the decision of the Supreme Court of the United States, overruling the others, that this is a charter tax upon the shareholder, and not a tax upon the corporation, and an exemption, therefore, of the shareholder also; and, thus tack the two sets of cases together, as a common adjudication that both corporation and shareholder are exempt. The bank could do this if the Supreme Court of the United States had

ever decided that a tax upon the shareholder and an exemption of his individual property in the shares held by him from any further tax upon those shares as to him extended the benefit of the exemption to the corporate property, and to the corporation in its corporate capacity. *The Supreme Court of the United States has never decided this, and for the very plain reason that such a question was never before it, and, under the conditions of the cases, could not have been.* It could have had no jurisdiction of such a question, through the avenue of a writ of error from the Supreme Court of the State, because that court had never decided *against* any claim of the corporation from further taxation upon its capital shares, but always in favor of that claim."

The bank here certainly cannot insist that the State court decisions must be followed, so far as concerns the question of the want of power on the part of the State to tax the capital stock, and must be departed from, so far as concerns the power to tax the shareholders.

The power to tax the shares of stock was based by the Supreme Court of the State expressly upon the proposition that the charter tax was upon the corporation and not upon the shares. This court, reviewing that decision, held that the charter tax was upon the shares and the exemption therefore of the shares; and we submit that the defendant will not be allowed to piece the two decisions together, and thus claim exemption for both, when neither court has decided that *both* are exempt—the one applying the charter tax and the exemption to one class of property, and the other to another.

We need hardly cite the decisions of this court to the effect that a party claiming exemption from taxation must show that the legislative act so intended beyond a reasonable doubt; that any fair doubt upon such a question must be solved against the grant, and in favor of the State; that the intent to

surrender the sovereign power of the State must be unmistakably clear in order to be upheld.

This proposition is announced, among other cases, in the following:

"Whenever exemption is claimed, it must be shown indubitably to exist."

Farrington v. Tenn., 95 U. S. 686.

"The intention to surrender must be manifested by words too plain to be mistaken."

Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416.

It must appear that "the Legislature has unmistakably so enacted."

Tenn. v. Whitworth, 117 U. S. 136.

"Before any such exemption or limitation can be admitted, the intent of the Legislature to confer the immunity, or prescribe the limitation, *must be clear beyond a reasonable doubt.* All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is, that the rights, privileges and immunities, not expressly granted, are reserved. There is no safety to the public interest in any other rule; and with special force does the principle upon which the rule rests apply, when the right, privilege or immunity claimed calls for an abridgment of the powers of the government, or any restraint upon their exercise. The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this court has said, the whole community is interested in retaining it undiminished, and has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear. * * * The surren-

der, when claimed, must be shown by clear, unambiguous language, *which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the Legislature, that doubt must be solved in favor of the State.*"

Delaware R. R. Tax, 18 Wall. 225–6.

"It has been held many times in this court that a State may make a valid contract that a corporation or its property within its territory shall be exempt from taxation, or shall be subject to a limited and specified taxation.

"The court has, however, in the most emphatic terms, and on every occasion, declared that the language in which the surrender is made must be *clear and unmistakable.* The covenant or enactment must distinctly express that there shall be no other or further liability to taxation. A State cannot strip itself of this most essential power *by doubtful words.* It cannot, *by ambiguous language*, be deprived of this highest attribute of sovereignty. This principle is distinctly laid down in each of the cases referred to. It has never been departed from." Erie R. R. Co. v. Penn., 21 Wall. 498.

"The taxing power is vital to the functions of the government. It helps to sustain the social compact, and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden; but the contract must be shown to exist. There is no presumption in its favor. *Every reasonable doubt should be resolved against it.* Where it exists it is to be rigidly scrutinized, and *never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require.* It is in derogation of public right, and narrows a trust created for the good of all."

Tucker v. Furguson, 22 Wall. 575.

These citations, and extracts of this character, could be multiplied *ad libitum*, but we refrain from further loading the brief with them.

We fully concede, as was said by the court in the case of *Gordon v. The Appeal Tax Court*, 3 How. 342, that "the faith of States is never pledged, but for some substantial end, within the competency of their legislative power." In other words, we concede that the words of the charter here in question, "in lieu of all other taxes," will not be so construed as to render them idle or meaningless; that they were intended to accomplish some substantial exemption, either to the corporation or the shareholders. We admit that a substantial exemption was intended; but we submit, in the language of Judge Swayne (who delivered the opinion in the Farrington case), in the case last above cited, that that exemption "is to be rigidly scrutinized and never permitted to extend, either *in scope or duration*, beyond what the terms of the concession clearly require." The *duration* of the exemption was the great question that was considered and decided in the case of *The State Bank of Ohio v. Knoop*, 16 How. 369, the majority holding that the exemption which, in express terms, was in favor of both the corporation and the shareholders, extended over the entire life of the corporation; the minority, that it was a rule of taxation covering only each semi-annual period *as it elapsed*, but revocable at the will of the Legislature.

The words "in lieu of all other taxes" make an incomplete sentence. "In lieu of all other taxes" on what person, or on what subject of taxation, is the question to be determined. Is the sentence to be filled up by saying, in lieu of all other taxes on the shares? It was so held in the Farrington case, 95 U. S.

Is the defendant bank to be allowed now further to enlarge upon the filling-up process, and say that it is to be read "in

lieu of all other taxes" *on the franchise, the capital stock, or the shareholders?* If the latter, it seems to us to be clear that the result can only be accomplished by violating the rule so clearly laid down by Judge Swayne, and above quoted, in respect of *the scope* of the exemption. The terms of the concession do not require that its scope should be extended, by implication or inference, to any subject matter of taxation, except that upon which, by the forepart of the same sentence, the charter tax is laid—towit, the shares of stock—that being the subject matter of the charter tax, as decided in the Farrington case.

Reading the words as meaning, in lieu of all other taxes on the shares, not only makes the relative exactly correspond with the antecedent, but accords with the rule of strict construction invariably applied in cases of this character.

If the franchise, the capital stock, and the shares of stock, be three distinct subjects of taxation, by what fair process of reasoning can it be said that the commuted charter tax on the shares, "in lieu of all other taxes," is to be taken and treated as a commutation of all taxes on the capital stock or franchise?

If, as is now conceded, the capital stock and shares of stock be distinct and separate subjects of taxation, and if the charter tax be, as decided in the Farrington case, on the shares, how, with any regard to the accuracy of language, can a tax on the capital stock be called another or additional tax? Do not the words "other taxes," *ex vi termini*, import other taxes on the same, not on a different, subject of taxation?—or, other taxes on the same, not on a different, person? The corporation and the shareholder are different persons—their respective properties separate and distinct; and, whether referring to the person taxed, or the property taxed, we should never speak of one tax, and then of other or additional taxes, unless such other

or additional taxes were upon the same person or the same property.

"The identity of the thing (or person) doubly taxed" is necessarily involved when we speak of one tax and then of another or additional tax.

If this immunity from taxation is to be indulged in favor of a subject of taxation other than that upon which the charter tax is laid—towit, the shares of stock—where is the limit? Where will this constructive exemption stop? We submit that all such inquiries are to be solved by a simple adherence to the uniform course of decisions from the Farrington case to that of *New Orleans v. Houston*, under which the words "in lieu of all other taxes," or "any further tax," or "any additional tax," are construed as evincing an intent to exempt that same subject of taxation upon which the charter tax was laid.

The case of *Gordon v. The Appeal Tax Court*, 3 How. 133, is confidently relied upon by the defendants.

That case was much discussed, and its distinctive features pointed out, by the Supreme Court of Tennessee, in the opinion reported in the 8th Bax. case. In the dissenting opinion in the Farrington case, 95 U. S., Strong, J., said: "I find nothing in *Gordon v. Appeal Tax Court*, so much relied upon by the plaintiffs in error, necessarily inconsistent with what I have said. That case has not been well understood. The circumstances were peculiar, and the decision rendered should be considered with reference to the peculiar facts which appear in it. What is in fact decided, we had occasion to observe in *People v. The Commissioners*, 4 Wall. 244, where Nelson, J., directed attention to the circumstances that more or less controlled the judgment."

In said case reported in 4 Wall. 244, Nelson, J., for the court, said: "That case turned upon the construction of an act of Maryland, exempting banks from taxation on account of the large bonus to the State for an extension of charter. This court held that, upon a true construction, the stockholders were within the scope of the exemption. The court say: 'In whatever way we examine the acts of 1813 and 1821, we are of opinion that it appears, from the 11th section in those acts, to have been the intention of the Legislature which passed them to exempt the stockholders from taxation, as persons, on account of the stock which they owned in the banks.'"

And in *N. O. City &c. Co. v. New Orleans*, 143 U. S. 195, this court said: "In *Gordon v. Appeal Tax Court*, 3 How. 133, upon which the plaintiff in error much relied, the only point decided was that an act of the Legislature, continuing the charter of a bank, upon the condition that the corporation should pay certain sums annually for public purposes, and declaring that, upon its accepting and complying with the provisions of the act, the faith of the State was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock; *and so much of the opinion as might, taken by itself, seem to support this writ of error, has been often explained or disapproved. State Bank v. Knoop*, 16 How. 369, 386, 401, 402; *People v. Commissioners*, 4 Wall. 244, 259; *Jefferson Bank v. Skelly*, 1 Black 436, 446; *Farrington v. Tennessee*, 95 U. S. 679, 690, 694; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 328."

A critical examination of said case of *Gordon v. Appeal Tax Court*, will show—

1st. That the act of the State of Maryland, there in question, undertook to tax only the shares of stock.

2d. That the proposition made by the State was made to existing corporations, and was intended to be made in a form that would most probably induce acceptance on the part of the corporations—whereas, it is notorious, and has often been judicially noticed by this and other courts, that charters are universally drafted by the promoters, and in a form as favorable to themselves as the State can be induced to enact.

3d. That the proposition submitted was in substance offered to the stockholders, through whose votes alone the corporations could accept it; that these stockholders already held an existing property, in the shape of shares of stock, that must necessarily be largely affected by the acceptance or rejection of the proposition submitted by the Legislature; and that under the circumstances of the case, the contract of exemption, though made in the name of the corporation, must be held to have been made with the stockholders.

4th. Like the case of Farrington, 95 U. S., the only subject of decision there was of taxation upon the shares of stock. The corporations, as to their real and personal property did not, and had never claimed the exemption, the opinion containing this passage: "It is admitted that the old banks accepted and have complied with the terms and conditions of the act of 1821; that they also accepted and have complied with the provisions of the act of 1834; and that *taxes have always, since the incorporation of the banks, been assessed and levied upon their real and personal property, in all the cities and counties of the State, in the same manner as upon property of the same kind belonging to individuals, and they have always been paid by the banks up to this time.*"

The case was rested upon its peculiar facts, and the opinion affords very slender, if any, support to the proposition that an exemption of the corporation would, by implication, exempt the shareholders, or that an exemption of the

shareholders would by implication exempt the corporation; and if it could be read in support of such a proposition it has been repeatedly explained away or overruled by this court in the cases we have already cited.

An admirable statement and analysis of that case (taken largely from the transcript of the record) will be found in the dissenting opinion of Catron, J., in the case of the *State Bank of Ohio v. Knoop*, on page 401, *et seq.*, of 16 How.

It is a mistake to say that our construction of the charter deprives the shareholders of any substantial benefit of the exemption therein contained.

It is argued for appellants that the act under which the bill is filed, towit, section 14 of the general assessment act of 1887, is, in the light of our admission that the shares of stock are exempt under the 95th U. S. case, a mere effort "to whip the devil around the stump," and indirectly do that which we concede cannot be directly done. It is insisted that the direction in section 14 of the act of 1887, to the effect that the value of the capital stock shall be ascertained by taking the aggregate value of the shares of stock is quite conclusive of the purpose, indirectly, to tax the shares of stock. That this is a denial of any substantial benefit of the charter rests simply upon ignoring the fact that the capital stock and shares of stock present two distinct subjects of taxation, and that, in the absence of any charter or contract exemption, the State could undoubtedly have taxed both. This proposition is most clearly shown by adjudged cases. For example, the case of the *City of Memphis v. Ensley*, 6 Bax. 553.

The case is stated thus by Justice Freeman: "In this case the Gaslight Company had all their capital stock invested in gas works, manufactory, and appurtenances necessary to the production and supply of gas. This property has been

regularly assessed for taxes and the same were paid. A tax, however, has been assessed on the shares of stock, owned by the stockholders, at their market value as part of the personal property of said stockholders, the stock being valued at fifty cents on the dollar as the market value." It was claimed that the effort to tax the shares, after taxing the property directly to the corporation, was double taxation. There was no contract for exemption involved, and the court stated that "the naked question was whether a tax on the capital stock is a tax on the shareholders," and was therefore bad under the rule against double taxation. There was no question that the capital stock of the company had been invested in property that was assessed directly to the corporation. It was held that the tax upon the shareholders was valid and must be paid, upon the ground that the capital stock and the shares of stock were distinct and separate subjects of taxation. The converse of the proposition came on and was decided in the case of *The Nashville Gaslight Co. v. Nashville*, 8 Lea 497.

In that case the shareholders had paid the tax assessed upon them as such, and upon that fact the corporation resisted the liability to pay the tax upon its gas works and property in which its capital stock had been invested. Their contention was overruled, the court holding that "under the act of 1873, chapter 118, joint stock companies are liable to pay the tax imposed upon their shareholders and also upon their real estate, though the real estate may have been purchased with money paid in as capital stock." To the same effect is the recent case of *St. R. R. Co. v. Morrow*, 3 Pick. 406.

From these cases, and many others of like import that could be cited, to the effect that the shares of stock and the capital stock are distinct and separate subjects of taxation, it is undeniably apparent that, but for the charter exemption, the defendant company could have been compelled to pay a

tax upon its capital stock and the shareholders upon the shares of stock. *The latter tax is prohibited by the charter exemption.* Without the exemption, if the aggregate of taxes for State, county and municipal purposes was three per cent. the capital stock *could* have been taxed three per cent. of its value, and the shares of stock three per cent. of their value, thus making an aggregate tax of six per cent. upon the whole. Under the charter exemption the aggregate tax would only be three per cent., not including the charter tax in that aggregate.

The fact that the State, in its revenue laws, has generally, but not by any means uniformly, chosen not to tax both—a policy that could be abandoned at any time—is an accident of the case, and does not in the least affect the argument.

In closing the argument on the general question of the extent of the exemption clause of the charter, we undertake, as briefly as possible, to reply to the elaborate opinion of the Circuit Judge under which the bill was dismissed.

In the first place we submit that the opinion commences with a fundamental error in respect to the controlling principle covering the legal effect and meaning of the contract of exemption from taxation; and this mistake underlies the whole opinion. We have already, as we think, by full quotations from the opinions of this court, shown that the rule is one of most rigid construction in favor of the State, resolving every doubt in its favor; that the curtailing of its sovereign power of taxation will never be adjudged unless the intent of the State be clear beyond a reasonable doubt. The Circuit Judge announced the rule in this language:

"It is altogether true that in and about that business, and in drawing up the 'contract' in the form of a 'charter' to manifest the agreement of the parties, the State will not be presumed to have curtailed its powers of taxation further

than the words of the instrument shall plainly express, or by necessary implication shall be plainly indicated, but otherwise all the conditions above suggested were open to those parties, absolutely. The same rule of plain expression or necessary implication applies in the construction of all contracts, not more to charters than to others, except that the courts, perhaps, are more careful in dealing with such cases than others, for obvious reasons of public benefit, though in strictness the courts should not less carefully deal with any contract whatever.

"*It is an exaggeration of this carefulness, however, to suppose that the words of a contract about the taxation of a bank are to be differently construed than the same words about any other subject to which they would fitly apply, merely because they are applied to a matter of taxation of a bank. The same carefulness of construction about any other subject would produce the same result.*" Page 3.

It might as well have been said that there is no real difference between rules of civil and criminal trials—the one requiring a preponderance of evidence only, and the other, conviction beyond a reasonable doubt.

2d. The suggestion just made of a fundamental error underlying the opinion is best illustrated by what we now suggest as the second error thereof, to be found in the language following, towit:

"Another consideration, before we take up the language of the act, is pertinent here. Next to this rule of strict construction the State insists upon treating this charter tax as one strictly levied upon the shares of stock in the hands of the individual shareholders, and consequently claims that the exemption is one belonging to the shareholder alone, applicable only to him and his property interest, and not at all to the bank. But if it be granted that the tax is of that precise

nature, does the conclusion follow, necessarily, in logical sequence? Concede that a tax upon the shareholder is not a tax upon the bank, directly or indirectly, and grant this premise also, and does the conclusion follow inevitably that an exemption of the bank and its property may not be granted to these shareholders in consideration of a charter tax upon them and their property? Why may not the Legislature, with all conditions open to it, as they were, exempt the bank from all taxation in consideration that the shareholders shall pay a tax, fixed, no matter how, by agreement between them, either upon their shares, in that bank or any other property the shareholder might own?" Page 6.

And, further, in the same vein:

"The basis for the logical conclusion under consideration would be an affirmance that no exemption of a bank and its property can inure to its benefit unless it be predicated of a tax on the bank itself, or its property; which is obviously unsound." Page 7.

These passages are wholly away from the argument made by us. We did not contend that it was not entirely *competent* for the State, in consideration of a tax upon the shareholders, to exempt both the shares of stock and the corporation from further taxation; but we submit that the question put and answered in the opinion is exactly the reverse of the true question. It is there asked, conceding the charter tax to be upon the shares, "Does the conclusion follow, inevitably, that an exemption of their bank and its property may not be granted to these shareholders in consideration of a charter tax upon them and their property?" But the real inquiry is, not whether the court must come to the inevitable conclusion that the corporation is taxable, but whether it must come to the inevitable conclusion that it is exempt. It is taxable by the general law. Claiming exemption, it must show

that exemption by an inevitable conclusion from the language of the grant.

3d. The deciding portion of the opinion will be found in the passages now quoted, towit:

"Let us now take the language of this act of the Legislature, and reading it with a purpose not to abate or restrict the State's powers of taxation one jot beyond what the words fairly import, on the one hand, and a like purpose not to deprive the stockholders of any benefit fairly granted to them as a basis for the investment of their money in this institution on the other hand, and what does it mean? Both sides contend that the sentence containing the exemption is elliptical. Each side supplies the ellipsis in its own way. The State would read the extended phrase: 'which shall be in lieu of all other taxes upon said shares of stock;' the bank would read it: 'which shall be in lieu of all other taxes upon said institution.' Either reading would make the case clear for the party proposing it, but it is only another mode of presenting the contention between them. Taking the sentence as it is, and the first criticism I should make would be upon the somewhat obscure, if not inaccurate use of the final words, 'other taxes,' without a repetition. Also, in some form, of the word 'pay,' which is just as important in relation to the antecedent or as a part of the antecedent to which the relative pronoun 'which' refers as the word 'taxes.' Remembering that this is not a revenue law but a charter—an act designed to define all that needs defining concerning an 'institution,' as it is called—and it seems to me a very unnecessarily narrow limitation and one that is not fairly permissible to refer 'which' only to the preceding word 'tax' as its antecedent. The full sentence comprises two independent subjects, each a privilege, or else one a privilege and the other an immunity, perhaps. One provides a lien upon the shares of stock as against the

stockholder for his debts, and the other this immunity, whatever its extent, from further taxation. Now why should the same breath, so to speak, create for the bank a lien and for some one else than the bank an immunity? The restriction of the relative pronoun 'which' to the bare word 'tax' is necessary to accomplish this, and ignores wholly the leading words, 'said institution shall pay,' as a part of the antecedent, which, it seems to me, is exactly the words, 'said institution shall pay to the State an annual tax,' no matter what or how described, so far as it relates to the mere grammatical analysis of this sentence. Now, if we are permitted to supply any ellipsis, instead of adding to the end of the sentence words selected to express a given meaning, I should insert words expanding the relative pronoun into its proper antecedent and defining the word 'other,' in relation thereto, or in its relation to the subject of regulating by its charter the payment by the bank of taxes, whether its own taxes or those of some one else, not impossibly an entire stranger, if the parties were so minded. Thus reconstructed the sentence would take the form of full direction and read thus: 'And said institution shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which payment of this annual tax to the State shall be in lieu of all other payments of taxes for that year.' This would be fairly within the scope of the whole act which is constructing a charter for a bank and regulating the bank in the matter of its payment of taxes, the amount to be paid, the person to be paid, the frequency with which the payments must be made, and the force and effect of the payment when made. The final word 'taxes' loses none of its force, but gathers perspicuity by continued association in this construction with the word 'pay' and the word 'institution,' for the benefit of which this whole act was constructed and passed. It is not even suggested in argument, much less claimed, that the very strictest construc-

tion of the words 'to the State' would limit the exemption to one from further State taxes and would not include any exemption from county or municipal taxes; but it is conceded these are included so far as the shareholders' property is involved. Yet the rule of strict construction in favor of the taxing power of the State would be no more misapplied to such a limitation than the other.

"Clearly the awkwardness of the sentence arises out of the compression of the idea into words and phrases that shall be brief and comprehensive rather than explicit. Grammatically, the analysis of its parts should be considered in relation to all that goes before, not only in the sentence, but likewise in the whole document or instrument. The 'pregnant brevity' of the style should not be overlooked, as it affects the syntactical arrangement of the sentence. The phrase 'in lieu of all other taxes,'—which is the subject of the great contention between these parties—is, naturally, either an adverbial phrase modifying the verb 'pay' or an adjective phrase qualifying the noun 'tax,' or rather the subject 'annual tax.' Strictly it should have been more closely placed to either the verb or the noun, to display with precision the intention of the writer in that behalf, but unfortunately he has chosen to convert into a clause, introduced by a relative, as a co-ordinate and somewhat independent affirmation rather than as a modifier in the shape of either phrase or clause, adverbial or adjective; which arrangement intensifies that obscurity of meaning, giving rise to this lawsuit. If he had modified the verb by placing the words adverbially near it, the meaning would be quite plain in favor of the contention of the bank in this case, *though it still would not be entirely free of doubt whether the bank was to be exempt or only the stockholder*, or both, as any one may see who will so reconstruct the sentence. So if he had modified the noun or subject, 'annual tax,' by placing the phrase adjectively in immediate contact therewith, the arrangement

would have been somewhat more favorable to the State than now it is, but scarcely less doubtful than by the present arrangement. Perspicuity required that there should have been an entirely new sentence or independent clause, at least, with more amplitude of expression, to convey either of the meanings now contended for by these parties. The construction adopted forces us to determine whether the relative 'which'—relative in form—is really intended to be a relative or something else, and if used as a relative, whether it bears the simple subject, 'annual tax,' or teems with the complex subject, 'said institution shall pay to the State an annual tax.' I have already indicated my preference for this latter construction, simply because the act is dealing with the rights, duties, conduct, privileges and immunities of the 'said institution,' primarily, *and not with a tax upon the citizen or his property, individually.* The word 'which' gives writers a great deal of trouble, and its usage is varying, as the consultation of any standard work on grammar will show. It is often equivalent to 'and it,' or 'that,' used interchangeably. If either of these be substituted for it here, the sentence reads more favorably for the contention of the State in this case, though it does not settle the doubt by any means. But this usage is said to be not generally observed by modern writers in this country, and the rule is given that 'which' is to be used in preference to 'that' or 'and it' whenever its clause introduces a new fact about the antecedent; 'that' is to be preferred when the clause is dependent and limits or defines the antecedent. (*Maxwell's Adv. Gram., section* 266; *id. section* 282.) The use of the word in this sentence seems to accord with this rule, as the clause is independently introducing a new fact about the antecedent, and not limiting or defining it. But what is the antecedent? 'The antecedent may be a noun, a pronoun, a phrase or a clause.' (*Max. Adv. Gram., section* 280; *id.* 570–572. See also Reid's Higher Eng.,

pp. 109, 111, 113, 121, 122.) It seems to me that to supply the simple word 'tax' as the only antecedent here, and to read 'which tax shall be in lieu of all other taxes' is to adopt the restrictive and limited use of the equivalent 'and it' or 'that' and not to regard the introduction of a new fact about the antecedent which this clause is clearly intended to do. But if we take the whole preceding clause, viz: 'Said institution shall pay to the State an annual tax of one-half of 1 per cent. on each share of capital stock,' as our antecedent on the new idea introduced by this clause, itself introduced by the relative 'which,' and the meaning becomes quite clear that this annual tax, whatever its character or nature, and upon whatever it may be levied, whether on property of the bank itself or somebody else's property, is a payment to the State *by the bank*—and, by the way, the security and certainty of this payment by the bank in a lump sum rather than collecting the same sum in driblets of more or less widely scattered stockholders is not to be overlooked as a part of the consideration given for this exemption—'which' shall be in lieu of all other payments by it of any taxes other than this, whether this be a tax upon its own, its stockholders', or any one else's property. It is a universal exemption for each recurring year from all other tax burdens than this, and this construction accords with the design or scheme *to create an institution which shall be attractive to investors.* If this were not the intention, if this were not the design or scheme, this provision, limited as the State would now limit it after so many years of acquiescence, has no appropriate place in the charter of a bank, but belongs more properly to a revenue law, and may quite as well have been left out, for it is almost demonstrable that the bare exemption from a higher rate of taxation upon the chose in action of the shareholder, directly levied upon him individually, *qua* stockholder, and yet subject to a larger tax upon him, *qua* shareholder, by the indirect process of a tax

upon the bank or its property, belonging to him, *qua* shareholder, would be a mere shadow of the substance he desired and fairly might think he was obtaining. Indeed, it operates as a burden upon him over and above the ordinary stockholder not having this exemption, or may so operate, confessedly, under certain conditions. I cannot upon this analysis of the language of the charter apart from the adjudications, think that the Legislature intended by those words anything less than a complete and universal exemption of both the bank and the stockholder, from any than the charter tax, however improvident it may have been." Pages 10 to 15.

Upon these passages of the opinion (the italics being ours) we observe:

(*a*) If there was before any doubt that the words "which shall be in lieu of all other taxes" were ambiguous as to *the scope* of the exemption, the opinion would remove the doubt, and conclusively fix the fact of ambiguity.

The nicety of reasoning upon grammar and syntax here resorted to *in support of the exemption* is, as we submit, a violation of every rule of construction upon this subject.

(*b*) This reasoning tends simply to support the conclusion, announced in another branch of the opinion, that "presumably every provision in the charter pertains to the bank;" and that conclusion, if adjudged, would simply go to show that the decision of the Supreme Court of the United States in the Farrington case was wrong; that that court was mistaken in applying the exemption to the shares, and ought to have applied it to the corporation. The reasoning of the opinion, as we read it, does not meet the necessities of the defendant's case, which requires that the exemption should cover both the corporation and the shareholders.

This is well illustrated by this passage from the opinion: "Both sides contend that the sentence containing the exemp-

tion is elliptical. Each side supplies the ellipsis in its own way. The State would read the extended phrase, 'which shall be in lieu of all other taxes upon the shares of stock;' the bank would read it, 'which shall be in lieu of all other taxes upon said institution.'" Now if it should be read as last suggested, it would leave the shares of stock taxable, the exact contrary of the decision in the Farrington case; and in truth the defense must read it, "which shall be in lieu of all other taxes, either upon the institution or the shareholder."

(*c*) It is conceded in the above passage that if the clause be read, "which (tax) shall be in lieu of all other taxes" it would naturally be construed in favor of the State; and we submit that the suggested reading is not only natural but grammatical. But whether so or not, it is certainly consistent with the ordinary and popular sense of the words used. Therefore that reading should be adopted, under the rule of rigid construction in favor of the State.

(*d*) Lastly, without again quoting it, we deny that the amplified reading of the clause in question, as suggested in the opinion, any more tends to support an exemption in favor of both corporation and shareholders than the original clause without amplification, reading it just as it is written.

(*e*) The "historical" argument is in favor of the State, the course of decisions and legislation alike showing a clear knowledge by the courts and Legislatures of a distinction between taxation of the capital stock and of the shares of stock, showing taxation by the general law, sometimes of both, and sometimes of one only, and exemptions, sometimes of both and sometimes of one only.

In the Union Bank case, 9 Yerger, the general revenue law of 1835–6 was construed as taxing both the capital stock and the shares of stock—the court holding the former exempt and the latter taxable.

Under a charter granted to a bank under the act of 1837–8, it was enacted that "*the capital of said bank*, and all the funds thereof, *the shares of the stockholders* therein and the dividends thereon, shall be free and exempt from taxation."

Chapter 6, sec. 25, Acts 1837–8.

By the general revenue law of 1855–6 "all stocks" were declared taxable, but exemptions were declared of "all capital stock or property of all such incorporated companies as are exempt from taxation in their respective charters."

Chapter 74, page 79, Acts of 1855–6.

By the charter of the Nashville & Chattanooga Railroad Company, granted December 11, 1845, it was provided, in section 38 thereof, that "the capital stock of said company shall (should) be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops and vehicles of transportation, shall (should) be exempt from taxation for the period of twenty years from the completion of the road and no longer."

The charters of the Memphis & Charleston Railroad Company and the Mobile & Ohio Railroad Company, granted respectively on the 28th day of January, 1848, and on the 2d day of February, 1846, had similar provisions; and, construed by the context, these charters were held to exempt the capital stock (or, what was the same thing, the railroad properties in which it was invested) only for the periods named, and to exempt the shares of stock perpetually.

After the lapse of that period, the capital stock was taxable, and the shares of stock exempt. See p. 146.

Tenn. v. Whitworth, 117 U. S. 129.
Railroad Companies v. Gaines, 97 U. S. 697.

By the general revenue law of 1868–9, the State adopted the policy of taxing the shares of stock only in corporations,

but in the same section added a proviso to the effect that *nothing therein contained should protect the real estate of the corporation from taxation.*

Acts of 1868–69, Chapter 45, sec. 9.

This policy was continuously thereafter pursued by the State down to and including the general revenue law of the year 1885, the aforesaid section being re-enacted in each biennial general revenue law.

Of course the taxation of the realty of the corporation was a taxation of its capital, in so far as the same was therein invested. Under this system of taxation arose the cases of the Union and Planters Bank, the Bank of Commerce, the Memphis Gas Light Company, and the Nashville Gas Light Company already cited by us. The legislation and decisions show a distinct claim and exercise of the power to tax both capital stock and shares of stock, and no exemption, whether by charter or general law, should be held to apply to both, unless its language is so plain as to leave no doubt of the intent to exempt both.

The essential groundwork of the bill is, that the decisions of the State court have not the conclusive force of judgments; that they can be looked to as precedents only, and that as precedents they will not be followed by this court for the reason that, whilst declaring the paramount authority of, and a purpose to follow the opinions of this court, they have misconceived and misapplied those opinions—the latest utterance of the Supreme Court of Tennessee (*Memphis v. Union and Planters Bank*, 7 Pickle, *supra*,) unmistakably declaring that the judgment there pronounced was not the judgment that would have been pronounced by that court, if it had been at liberty to enforce its own conclusions; and that the decree pronounced was based solely upon what that court deemed to be the necessary result of the decisions of this court. Can

it be true that this court is powerless to rescue the State from an error into which its highest court has fallen in an effort to follow the opinions of this court?

The State court decisions were of a Federal question. They are based on the declared necessity of yielding to the paramount authority of this court, and, as we submit, have thus fallen into an error which this court, of all others, should be at full liberty to correct.

We need not go outside the briefs of adversary counsel, wherein they discuss the judicial and legislative history of this question in Tennessee, to show that down to the decision of the Farrington case, in 95 U. S., every line of judicial opinion and legislative act in Tennessee goes to establish that, by judicial and legislative construction, the class of charters here involved has been always construed to mean a charter tax upon the corporation, exemption of the corporation, and taxability of the shares of stock; and that not until after the decision of the Farrington case, in this court, did the courts of Tennessee ever hold both capital and shares of stock to be exempt. Since the decision of the Farrington case, in this court, it is true that they have twice *declared* both shares and capital exempt, and have twice *adjudged* the property in which the capital was invested to be exempt—the declaration and adjudication being expressly made in supposed obedience to the opinion of this court in the Farrington case. We have already undertaken to show that such declaration and adjudication was altogether erroneous; and this bill was filed under the conviction that this court would not feel itself bound to follow a decision of the State court, involving a Federal question, erroneous in itself, and expressly stated to be rendered only under the paramount constraint of a decision of this court.

That the Supreme Court of Tennessee holds to the theory that we have urged in this argument, is conclusively shown by the case of *Memphis v. The Memphis City Bank*, heard at the same time with the last case against the Union and Planters Bank and reported in 7 Pickle 579. In that case, dealing with the charter of the Memphis City Bank, the language of which is "that there shall be levied a State tax of one-half of one per cent. upon the amount of capital actually paid in, to be paid in the same way, and at the same time as other taxes are by law collected, which shall be in lieu of all other taxes and assessment," the court said: "That the charter tax is laid exclusively upon the capital stock is too manifest to admit of debate, and to our minds it is equally clear that the words 'which shall be in lieu of all other taxes and assessments' refer alone to the same subject of taxation. But the one object of taxation is mentioned. Hence it would be illogical to give the exemption greater scope. The exemption contemplated followed, in the legislative mind, as a proper result from the tax imposed. The property protected from further burden is that upon which a specific burden is already imposed. The shares of stock are liable for a charter tax; they are not embraced in the charter exemption; they are subject to taxation as other non-exempt property of the same kind."

The fallacy of the argument submitted by adversary counsel is that they take the Farrington case, 95 U. S., as conclusively establishing the non-taxability of the shares, and then, turning to the question of taxation of the capital stock, they are forced to rely, in the main, upon judicial decisions and legislative acts of the State of Tennessee, to show that the capital stock is not taxable, wholly ignoring the fact that every line of those decisions and acts was based upon the theory that by the proper construction of the charters involved, the

capital stock was exempt, and the shares of stock taxable—a theory that was overthrown by the decision of this court in the Farrington case—the proper result of which decision did not establish the exemption of both the capital stock and the shares of stock, but simply shifted the burden of taxation from the shares to the capital stock. It would be quite as logical for adversary counsel to take the concession of this brief, to the effect that the shares of stock are exempt, and then adopting the same line of argument that was pursued by counsel for the State in the Farrington case, direct their whole effort to show that the capital stock was exempt.

Such was in substance the line of argument adopted by the Circuit Judge.

II.

Another objection advanced in considering the said 14th section is, that aside from the intent, apparent therefrom (as is argued) to indirectly tax the shares, it directs the value of the capital stock to be ascertained in a manner that is fatally defective and faulty.

This manner, however, of ascertaining the value, was expressly upheld in the cases of *The Mercantile Bank v. New York*, 121 U. S. 160; *Oswego, etc., v. Dollaway* 21 N. Y. 449; *The People v. Commissioners*, 95 N. Y. 554.

It is evident that to tax the capital stock, as being equivalent in value to all the shares of stock, gives to the corporation the benefit of a mode of assessment that is not extended to other property, for the value of the shares represents only the *net* value of the properties of the corporation—that is to say, the gross value less its debts; whereas property generally is taxed according to its value without any deduction on account of debts due from the owner thereof.

But a plainer answer, perhaps, lies in the proposition that this is a subject with which the question of exemption has nothing to do. How can *the bank* complain that the mode of valuation prescribed by the law in question in any manner violates *the rights of the shareholders* to exemption from taxation? Clearly it cannot do so; and the sole question under this suggestion is, not whether any right of the shareholders protected by the Federal Constitution is violated (for that right is conceded, and there is no effort to violate it), but whether anything in the act contained is violative of the rights of the company under the State Constitution.

"All property shall be taxed according to its value, *that value to be ascertained in such manner as the Legislature shall direct*, so that the taxes shall be equal and uniform throughout the State."

Constitution of Tenn., Art. 2, sec. 28.

In the case of *Taylor v. Secor*, 92 U. S. 575, it was held that taking the funded debt and adding thereto the aggregate value of all the shares of stock was as fair a mode as could be suggested of ascertaining the value of the capital stock of a corporation for purposes of taxation.

III.

We answer, so far as we can, the several other objections made by the defendants to the tax legislation in question, taken and made from the standpoint of the State Constitution. The objections, as we summarize them, are these:

1st. That under the legislation in question these corporations would pay a greater tax than other like corporations, for that they first pay the charter tax to the State (the same generally being one-half of one per cent. on their capital stock), and are then further taxed in an amount equal to the tax laid upon other corporations.

2d. That the tax law is, as to these corporations, a special and not a general law, as much so as if they had been singled out by name and taxed in a particular manner different from the manner in which other like corporations are taxed.

3d. That the defendant corporations are taxed on their capital stock, and that the capital stock of other banks and insurance companies is not taxed at all, the tax generally being laid on the shares of stock, and not on the capital stock; hence it is said that the legislation is unconstitutional in that it violates that provision of the State Constitution requiring that taxes shall be equal and uniform.

4th. That the legislation prescribes a faulty and vicious system of assessing the capital stock, in that it directs that it be taken to be equal in value to the aggregate value of all the shares of stock; which mode of assessment is attacked principally, if not entirely, upon the ground that the shares of stock confessedly exempt from taxation have, on that account alone, a greater value than they would otherwise have; and that to treat the capital stock as equal to this greater valuation is to assess it, not according to its value, but according to the value of something else, having a quality of exemption which it has not.

To the first of these objections we reply:

The tax here in controversy is a tax upon the capital stock, or, it may be, upon the capital stock and franchises of the corporation. The tax is laid on the corporation itself; and if it be found that the capital stock is taxable, and upon the general features of the State legislation, is constitutionally taxed, *the corporation* cannot complain of the injustice of that tax upon the ground that *the shareholders* pay a given tax under the charter contract.

To the second of these objections we reply:

1st. That all the corporations within the category defined

by the legislation are taxed. It is true that by applying the legislation to the facts, it may be ascertained that it applies only to given corporations. That proposition is true of every classification. In other words, it is true that the membership of every class can be ascertained, the facts being given, and if this objection obtains no classification would be possible.

2d. But it is entirely clear that classification *per se* is not objectionable; that the real question is whether the tax upon the class is unequal, discriminative, or unjust. The mere fact that they are classed can certainly make no difference, if it be found that, after being classed, they are constitutionally taxed. This objection, therefore, must be determined upon the rulings to be made on the third and fourth objections as above stated.

3d. We consolidate the third and fourth objections, and reply:

(*a*) We submit that the fact that the capital stock of these particular corporations is taxed for the reason that the tax is forced on that property because of the charter contract exempting the shares, the capital stock of corporations generally not being taxed, but the shares of stock taxed in such other corporations, will not of itself vitiate the legislation.

The taxation is as nearly equal and uniform as the circumstances of the case would allow.

On the general subject of the equality and uniformity of laws taxing corporations, we cite—

Cooley on Taxation (latest edition),

the chapter on this subject beginning at page 164, and

33 American and Eng. R. R. Cases 447,

where a full and instructive note will be found.

Van Allen v. The Assessors, 3 Wall. 573.

Bradley v. The People, 4 Wall. 459.

People v. The Commissioners, 4 Wall. 244.

State R. R. v. Tax Cases, 92 U. S. 575.

We cite also—

City of Chattanooga v. R. R. Co., 7 Lea 561.

That case involved the question of the validity of that feature of the State tax law by which it was provided that the entire properties of the railroad companies should be assessed by the State Board of Assessors, and that upon a certificate of this assessment to the several counties and municipalities, the latter should tax the railroads respectively according to the mileage thereof in the counties and cities respectively, *and should not otherwise assess them.* It appeared that under the distributive mode of assessment as fixed by the legislation, the railroad company was taxed on about $40,000 in the city of Chattanooga. On the other hand, it appeared that the local assessors had assessed the local property—that is, the property having properly a *situs* in the city of Chattanooga—at about $120,000; and the city sued to recover the taxes on the latter amount. Its suit was sustained, the court holding that the general provisions of the Constitution and of the legislation authorized the local assessments, and that so much of the railroad tax law as declared the railroad exempt from any other assessment, was void.

At page 578 the court said: "It has seemed to us that a law like this, in terms effectually giving exemptions not authorized by a Constitution like ours, which definitely specifies the property which the Legislature may exempt, presents the simple question as to whether the Constitution or the enactment shall prevail. To that question there is but one answer."

On the same line of reasoning we here submit that the fact that the capital stock of other corporations is not taxed cannot be used to avoid a tax upon the capital stock of these corporations. They are in fact taxed with as near exactness of

equality and uniformity as was practicable. The cases above cited show that the mode of arriving at the value of the capital stock is a just one.

If there be other capital stocks that are not taxed, such objection, as was held in the 7th Lea case, *supra*, will be rectified, not by exempting these corporations from taxation, but by subjecting the others.

This line of objections, if sustained, would annul the whole revenue law of the State, if any tax-payer should be able to show that some other property—a proper subject of taxation—had been improperly exempted by legislative act, or omission to act.

Lastly, we submit that if the slight excess of taxation upon these corporations (treating the corporations and the shareholders as one) because of the payment of the charter tax by the shareholders, and the assessment of the general *ad valorem* rate upon the capital stock, in addition thereto, be objectionable, the court will correct it, not by avoiding the whole tax upon the capital stock, but by giving the defendant a proper credit for the payment of the latter tax.

Santa Clara Co. v. S. Pa. R. R. Co., 118 U. S. 394.

In that case it was held that the defendants must pay over what was legally due if the amount was capable of ascertainment.

In the case of *Lionberger v. Rouse*, 9 Wall. 468, it was held that the act of Congress requiring that any State tax on the shares of national banks must be laid equally and uniformly with the taxes upon other moneyed capital alike invested, was not violated by the fact that certain corporations of the State held charters under which the shares of stock therein were exempt from taxation. The court ruled that the act of Congress must be construed as meaning that the tax on

national bank shares must be equal and uniform with other *taxable* capital so invested.

It has been held by this court that the general revenue law of Kentucky by which the owners of other personal property were allowed to deduct their debts from the value of such personalty, but the owners of national bank shares were not so allowed, was violative of the act of Congress.

Supervisors v. Stanley, 105 U. S. 305.
Evansville Bank v. Britton, 105 U. S. 322.

But it was further held that the remedy against such vicious legislation was, not in striking down the whole revenue law, but in allowing the owner of the national bank shares to prove the existence of debts due from him and to deduct them, as the law allowed in other instances. In other words, the legislation was reformed, not annulled.

We have cited cases to show that the method adopted for assessing the capital stock of these defendants is unobjectionable. The court can readily see that such capital stock is invested in bonds, notes, exchange floating between Memphis and all parts of the world, and in an infinite number of ways, and is so invested indistinguishably from investments of other moneys received on general deposit, and that an ascertainment of the aggregate value of the property in which the capital is invested would be almost, if not absolutely, impossible.

In the cases already cited, it will be seen that in some of the legislation sustained by the courts, the capital stock is taken to be equal to the aggregate shares of stock *and* the fixed indebtedness of the corporation—in this respect, going beyond our statute. These corporations should not be permitted to object, that the capital stock is taken to be equal to the aggregate of the shares of stock, for in that mode of

assessing, the corporation is given the benefit of a deduction of all its debts, inasmuch as the shares of stock are to be taken as equal to the entire value of the capital stock and franchises, less the debts.

IV.

We believe that much argument need not be indulged on the plea of *res judicata* as embodied in the answer.

The case of *Farrington v. The State*, 95 U. S., is manifestly unavailable in this respect *to the corporation*, on the question of the power of the State to tax its capital stock. Under the legislation of the State, as it then existed, the tax was laid exclusively upon the shares of stock, and none upon the capital stock. *The corporation was not a party to the case;* and no decision could by any possibility have been rendered touching the power of the State to tax the capital stock. That question could, by no possibility, have cut any figure—except perhaps, argumentatively, in reaching a conclusion as to whether or not the shares of stock were taxable.

How far the judgment in that case might be conclusive in favor of the shareholders, we do not care to discuss, inasmuch as the State is not only willing to concede, but insists upon the exemption of the shares; and the shareholder, Williamson, was brought before the court by this bill for the sole purpose of making a case in which both corporation and shareholder would be before the court in one proceeding, wherein the court might determine whether both the shares of stock and capital stock were exempt under the charter.

The defendants also rely upon the record of the case of the *State v. The Union and Planters Bank*, 7 Pickle, as conclusive in favor of both the shareholders and the corporation. Here again, for the reasons already stated, we do not care to discuss the conclusiveness of the record so far as concerns the shareholders.

As to the corporation, we submit that that record has not the conclusive force of a judgment (whatever weight it may be entitled to as a precedent) for the reasons following, towit:

First. The two records do not involve the same identical matters—this bill being brought for the recovery of taxes alleged to be due to the State and county, and that being brought for the recovery of taxes claimed by the city of Memphis; and, besides, the taxes now sued for are for different years from those then sued for.

Second. There can be no color of claim that the county was a party to that proceeding.

Third. The State was only a nominal party thereto—the bill being prosecuted in the name of the State for the use of the city of Memphis, and by the city of Memphis for itself, to recover taxes alleged to be due to the municipality.

"In all suits prosecuted in the name of one person for the use of another, the person for whose use the suit is brought shall be held the real plaintiff of record."

Code of Tenn., (M. & V.) sec. 3492.

"The nominal plaintiff has no control over the suit, nor will it abate by his death."

Burton v. Dees, 4 Yerg. 7.

It is manifest from the transcript of the record of that case, that the bill was brought and prosecuted by the city's solicitors for the collection of city taxes—that the State's officers had no connection therewith, and the State no control over the same.

Under such circumstances it is clear that the municipality alone is bound by the judgment rendered.

St. Paul & Sioux City R. R. Co. v. Robinson, 40 Minn. 360.

The real party only is bound.

Bigelow on Estoppel, p. 65.
2 Black on Judgments, secs. 536–610.
Bunting v. Holmes, 9 Lea 321.

The case of the *St. Paul & Sioux City Railroad v. Robinson*, *supra*, seems to be exactly in point. In that case the court said:

"Subject to certain limitations, these corporations determine for themselves the amount and purposes for which taxes shall be raised upon the property within their jurisdiction; *and it is not unusual for the Legislature to authorize such municipalities or districts to levy and collect its own taxes by separate proceedings, and wholly through its own officers.* It was formerly so in the case of school districts in this State. Pub. St. 1858, c. 23, sec. 66.

"Under our present statutes, the county officers of each county, in levying and collecting taxes, are *pro hac vice* the agents of the several local political subdivisions in the county, acting for them as well as for the county. Gen. St. 1878, c. 11, secs. 49, 50, 54; *City of St. Paul v. Colter*, 12 Minn. 16 (41, 51,) (90 Am. Dec. 278); *Guilder v. Town of Dayton*, 22 Minn. 366–371. Each county, city, town, and school district is separately and peculiarly interested in the question as to the amount of property subject to taxation within its limits, both as respects the purposes of taxation and the rate. *They have each a right to be heard, then, upon the claim to exempt such property.* It is undoubtedly competent for the Legislature to provide that, in a matter of public and general interest, the issues may be determined for the whole State in one action, in which shall be represented all interests and political subdivisions. But such is not the nature of this case. It is not material that the attorney-general appeared in that action. The rule is not thereby changed, and our attention has not

been called to any statute giving such effect to a suit of this character, or any satisfactory authority supporting the proposition that an action brought against the officers of one county, city, or school district, by the owners of lands therein, shall be notice to and bind all other similar bodies corporate in the State, whether they have any opportunity to be heard or not. The local authorities of Cottonwood county had no legal notice of the suit by plaintiff against McDonald, had no opportunity to produce witnesses or be heard on the trial, and are not bound by the decision and judgment in that case. *Adams v. Auditor General*, 43 Mich. 453, (5 N. W. Rep. 457). It is true that the decision in one such suit, in practice, frequently disposes of other similar cases as a precedent, if the facts are undisputed and the law arising thereon is fully and finally determined, because it would be idle to try other cases, under such circumstances. But that does not affect the question of the legal rights of other parties to litigate the questions of fact, or be heard in their own cases. The decision, then, in the case referred to, cannot, we think, be held a conclusive bar to the assertion of defendant's rights in this action."

As suggested in the above case, the State of Tennessee had, by its Legislature, before the filing of the bill passed upon in the 7 Pickle case, authorized the city to employ counsel and prosecute suits for the collection of taxes due to it.

"Said municipality (the city of Memphis) shall have power to appoint and employ an attorney to collect any and all delinquent taxes that may be due it, and may fix the compensation of said attorney at not more than ten per cent. of the collections made by him; such compensation, so fixed, to be charged upon and paid by the persons owning the property from whom such delinquent taxes may be collected."

Acts of 1889, chap. 163, sec. 9.

"Be it enacted, etc., That section 14 of the Acts of 1879, (the original charter of the city of Memphis) chapter 11, passed January 29, 1879, and section 9 of the Acts of 1880, (misprint for 1889) chapter 163, and acts amendatory thereof, be amended so as to strike out all of said section 9 from and after the word 'provided' in the eleventh line of said section, and insert in lieu thereof the following: Said attorneys shall have the right to file original bills against any and all parties for taxes when the same shall become delinquent by operation of law, in the name of the State of Tennessee, for the use of such municipality."

Acts of 1891, ch. 81, sec. 1.

The body and the signatures to the bill in said case reported in 7 Pickle, unmistakably show that it was prosecuted in behalf of the city of Memphis, and by solicitors employed by it, under the legislation aforesaid.

The decision, therefore, cannot have the conclusive force of a judgment, either as to the State, or the county.

We have already discussed that decision as a precedent, but whatever weight may be claimed for, or attached to it in that respect, it certainly has not the conclusive force of a judgment, as against the State and county, in a proceeding instituted for the collection of State and county taxes.

V.

The jurisdiction of the Circuit Court of the United States, in which the bill was filed, cannot be successfully denied.

The judicial power of the United States, so far as material to this question, is conferred by the second section of Article III of the Federal Constitution in these terms: "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

Original jurisdiction upon the ground here in question was first conferred upon the Circuit Courts by the judiciary act of March 3, 1875, and was continued by the judiciary act of 1888, the first section of which confers original jurisdiction of any suit of a civil nature, etc., "arising under the Constitution or laws of the United States;" and the second section of the same act, regulating the removal of cases from the State courts, confers removal jurisdiction in the same terms.

The language of the act of Congress and that of the Constitution being identical, we would not need authorities to support the proposition, either of the *intent*, or *power* of Congress to confer an original jurisdiction of all cases arising under the Constitution or laws of the United States. But as far back as the case of *Osborne v. The Bank of the United States*, 9 Wheaton 823, Chief Justice Marshall, speaking for the court said, "that when a question, to which the judical power of the Union is extended by the Constitution, forms an ingredient of the original case, it is in the power of Congress to give the Circuit Court jurisdiction of that cause." On page 821 of the same case he had already said, "original jurisdiction, so far as the Constitution gives a rule, is co-extensive with the judicial power. We find in the Constitution no prohibition of its exercise."

Under the plain power thus conferred by the Constitution, and thus exercised by Congress, this court has, without question, sustained both the removal and original jurisdiction. In *Tennessee v. Whitworth*, 117 U. S. 129, the case was removed from the State court of chancery to the United States Circuit Court, upon the ground that the defendant relied upon a charter exemption, and upon the proposition that the exemption was violated by the tax legislation of the State.

The United States Circuit Court, (Matthews, Justice, pre-

siding,) and this court took jurisdiction and determined the case on its merits.

In *Brown v. Houston*, 114 U S. 622, the complainants below filed an original bill in the United States Circuit Court to restrain the collection of municipal taxes sought to be enforced by the city of New Orleans against certain barges of coal, property of the complainants, upon the ground that the property in question had not become so mingled with the property of the State as to bring it under the taxing power of the State, and that the effort to tax it, in its then situation, was a violation of the interstate commerce clause of the United States Constitution.

This court, without question, accepted the jurisdiction and decided the case on its merits. So, also, in *New Orleans v. Houston*, 119 U. S. 262, the Louisiana Lottery Co. filed its original bill in the Circuit Court of the United States, upon the one ground that the revenue legislation of the State violated its charter contract with the State, and was void, because in conflict with the clause of the United States Constitution, forbidding the State to pass any law impairing the obligation of a contract.

It is true that the jurisdiction in these cases was not challenged; but they nevertheless indicate the sense of the profession and of this court, on the jurisdictional question—the question involved being one which this court has been always quick to scrutinize, and, of its own motion, to deny the jurisdiction, if none existed.

The case made by the bill is, that by the State's revenue law of 1887, re-enacted in 1889, the shares of stock in the defendant bank are taxed; and, in the alternative, if the shares of stock are exempt, the capital stock is taxed. The bill thereupon avers that the defendant corporation and its

shareholders deny the power of the State to tax either the capital stock or the shares of stock, upon the ground that the charter afforded a contract exemption of both, and that the legislation of the State, impairing the obligation of that contract, was in conflict with the United States Constitution, and void. The answer not only admits this averment of the bill, but *specifically claims the protection of the Federal Constitution as against the State legislation.* True, it does deny that that was the only defense relied upon, and does make other defenses, upon the questions of *res judicata*, and the validity of the legislation from the standpoint of the State Constitution. Without, at this moment, stopping to cite authorities from which it can be abundantly shown that the existence of these other defenses cannot affect the Federal jurisdiction, we shall examine the jurisdictional question as if those other defenses had not been set up, and as if the case was exactly as averred in the bill, to-wit: State legislation taxing the capital stock or the shares of stock, and a claim, by way of defense, of immunity from taxation under the charter contract, protected by the Federal Constitution. It is manifest that the question as thus presented is identical with that of the cases of *Brown v. Houston* and *New Orleans v. Houston*, *supra*, with the one exception that in those cases the jurisdiction was invoked by the party claiming the immunity, and is here invoked by the State. Upon that difference counsel for the defendants lay some stress, asking, in substance, whether it is possible that the State, in a case of this character, can make the Federal question by anticipating the defense; and it is, in substance, asked if the court, upon demurrer, should sustain such a bill, what would it do with it in the event it should turn out that the defendant made no such Federal question in its pleadings?

And lastly and most strenuously, it is urged that the jurisdiction on the ground of repugnancy between the legisla-

tion of the State and the Constitution of the United States, cannot be conferred by Congress, except as it was conferred and regulated by the 25th section of the judiciary act of 1789.

We think there is no serious difficulty in finding a satisfactory answer to all these objections to the jurisdiction:

First. The imaginary difficulty, arising out of the supposition that, in a case of this character, the defendant might decline to make the Federal question, could, perhaps, be sufficiently answered by saying that it would be time enough to answer that difficulty when the supposed case was actually presented. It is not presented here, for the defendants by their answer very explicitly make the Federal question.

But even the imagined case could, we think, be satisfactorily answered by that clause of the judiciary act, under which it is provided that if, at any time in the progress of the case, it should appear that the court had no jurisdiction, the case should be dismissed, or, if removed from the State court, remanded.

Texas Transp. Co. v. Seeligson, 122 U. S. 519–522.
Gold Washing and Water Co. v. Keyes, 96 U. S. 203.

Second. The argument against the jurisdiction, is in the main, based upon the language of this court, taken from the case of *Starin v. New York*, 115 U. S. 257, to this effect: "If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends will be defeated by one construction of the Constitution or laws of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not." If in this, and other like passages, the word "construction" bore the narrow sense attributed to it, of merely *ascertaining the meaning* of the United States Constitution, there would be strength in the objection, founded

on this definition; but clearly, the court did not intend to use the word in that narrow sense. The passage, as can be abundantly shown from other cases, means that if the Constitution is to be given due effect—if its operative and controlling power is applicable to the case, the case presents a Federal question.

In *Cook v. Avery*, 147 U. S. 386, this court said: "Clearly, the right of a plaintiff to sue cannot depend upon the defense which a defendant may choose to set up, and as on the first trial defendants relied on the decision of a Federal question to defeat the action, such a concession of the existence of a Federal ingredient in the cause might fairly be held to bind them when they subsequently abandon it, and seek to oust the jurisdiction upon the ground that there could be no real dispute as to *the applicable law*."

In the case of *Providence Savings Society v. Ford*, 114 U. S. 642, this court said: "If A have title to land by patent of the United States, and brings an action against B for trespass, or waste committed by cutting timber, or by mining or carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), *distinctly involving* the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States."

In the case of the *C. & A. R. R. v. Wiggins Ferry Co.*, 108 U. S. 22, the court defined the Federal question as one "*depending* on the Constitution or laws of the United States."

In the case of *Gold- Washing & Water Company v. Keyes*, 96 U. S. 203, this court said: "A cause cannot be removed from a State court simply because, in the progress of the litigation, it *may* become necessary to give a construction of the Constitution or laws of the United States. The decision of the case *must depend* upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to *the operation and effect* of the Constitution or laws, upon the facts involved. That this was the intention of Congress is apparent from section 5 of the act of 1875, which requires the Circuit Court to dismiss the cause, or remand it to the State court, if it shall appear, at any time after such suit has been brought or removed thereto, that such suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

"Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading (1 Chit. Pl. 213), that the suit is one which 'really and substantially' depends upon the construction *or effect* of the Constitution, or some law or treaty of the United States."

In the case of *Railroad Company v. Mississippi*, 102 U. S. 141, this court said: "That a case in law or equity consists of the right of one party, as well as of the other, and may, properly, be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either;

"That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or *protection, or defense* of the party, in whole or in part, by whom they are asserted;

"That, except in the cases of which this court is given, by the Constitution, original jurisdiction, *the judicial power of the United States is to be exercised in its original or appellate form, or both*, as the wisdom of Congress may direct; and, lastly,

"That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all *depend on* the Constitution or laws of the United States; but when a question, to which the judicial power of the Union is extended by the Constitution, *forms an ingredient* of the original cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, *although other questions of fact or of law may be involved in it.*

"These propositions, now too firmly established to admit of, or to require further discussion, embrace the present case and show that whether we look to the Federal question *raised by the State in its original petition*, or to the Federal question *raised by the company in its answer*," the removal should have been allowed.

But perhaps the utterances of this court in the case of *The Mayor v. Cooper*, 6 Wall., is more comprehensive than any yet quoted. The court there said: "The Constitution provides, 'That the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish,' and that this power 'shall extend to all cases, in law and equity, arising under this Constitution and the laws of the United States.' The other particulars of the grant of power it is not necessary in this case to consider.

"The power here under consideration is given in general terms. No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced. None are excluded. *How jurisdiction shall be acquired by the inferior courts, whether*

it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed."

The Constitution is silent upon those subjects. They are remitted, without check or limitation, to the wisdom of the Legislature.

"The sixth article declares that 'the Constitution and the laws of the United States, *which shall be made in pursuance thereof*,' * * * 'shall be the supreme law of the land.' The grant of the judicial power contains no such qualifications. It is declared to extend to '*all cases* arising under the Constitution and laws of the United States,' without distinction or discrimination as to the latter; *nor is there any restriction as to the tribunals, State or Federal, in which they may arise.* Wherever found, they are within the reach of this authority, and subject, for its exercise, to the law making power of the nation.

"As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have applied it. Their concurrence is necessary to vest it. It is the duty of Congress to act for that purpose, up to the limits of the granted power. They may fall short of it, but cannot exceed it. To the extent that such action is not taken, the power lies dormant. It can be brought into activity in no other way. *Jurisdiction, original or appellate, alike comprehensive in either case, may be given.* The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction, within the sphere of the power, extending as well to the courts of the States as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal causes. Both are within

its scope. Nor is it any objection that questions are involved which are not of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. 'A case in law or equity consists of the right of the one party as well as the other, and may be truly said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the right construction of either.' "

Third. This court, in the citations already made, has effectually disposed of the fact that the Federal question is only one ingredient of the case presented. That one ingredient is clearly sufficient to sustain the jurisdiction, notwithstanding the presence of other defenses.

Fourth. The fact that Congress, until 1875, had abstained from conferring original jurisdiction of a case arising under the Constitution of the United States, except in the restricted manner provided for and regulated in the 25th section of the judiciary act of 1789, certainly cannot affect its power to confer such original jurisdiction, broadly and unrestrictedly. It is urged that such a course, on the part of Congress, would necessarily deprive the State courts of an opportunity to first pass upon the validity of the State's legislation. This objection would be equally applicable to an act of Congress authorizing a removal, upon the ground that the case was one arising under the Constitution and laws of the United States; and yet, the right of removal, upon such a ground, has been once sustained by this court, and we believe the jurisdiction in such removal case could not be fairly questioned.

We know of no inherent or constitutional right on the part of the State courts to make the first decision of the Federal question, and the result of the argument that they should be allowed to do so would be simply to force the court to the conclusion, that until the State court had denied the pro-

tection of the Federal Constitution there could be no Federal question—manifestly a *non sequitur*. Under the 25th section of judiciary act of 1789, it is essential to the jurisdiction, (1) that a right, etc., was claimed under the Federal Constitution; and (2) that the State court had denied that right. Under the acts of 1875 and 1888, the jurisdiction depends solely on the existence of a case arising under the Federal Constitution or laws.

In our judgment the 25th section of the judiciary act worked the grossest injustice, in that it allowed the party claiming the protection of the Federal Constitution to first speculate upon the result of a decision in the State court, and losing there, to appeal to the highest Federal court.

It has always seemed to us that this was rank injustice; that the supreme authority of the Federal Constitution could be uniformly and impartially administered only by conferring original jurisdiction, *to be invoked by either party*, on the Federal courts. This supreme object was accomplished by the act of 1875, wherein that act conferred original jurisdiction, upon the one ground of the existence of a Federal question. The beneficence of this legislation would be entirely lost, if the argument of adversary counsel shall prevail; for, that argument would make the jurisdiction appellate only, and confine the right of invoking that jurisdiction to the one party, wholly denying it to the other; and thus, as to one of the parties, the original jurisdiction, conferred by the acts of 1875 and 1888, would be destroyed, and we would again be relegated to the 25th section of the judiciary act. It is probably true that no case will ever be presented, better illustrating the wisdom and justice of conferring original jurisdiction, than the one at bar; for, we here have a State corporation and its shareholders, escaping, substantially, all burdens of taxation, under an erroneous decision by the State

courts, of a Federal question, the decision being based not upon its own judgment, but upon its misconception of the judgment of this court. Of course the corporation, in such a case, now struggles to exclude the Federal jurisdiction; and yet it is the same corporation, the shareholders of which, when the State court decided against them, successfully invoked that jurisdiction, to reverse that decision. We simply ask to administer the same medicine, continue the same treatment, and invoke the decision of the highest Federal court, in explanation and construction of its own final decision on this subject.

The argument that Congress had no power to confer original jurisdiction, upon the ground of the repugnancy of the State's legislation to the Federal Constitution, except in the manner it was conferred by the 25th section of the judiciary act, reads strangely enough in view of the early history of that section. If the court will turn to the cases of *Martin v. Hunter's Lessees*, 1 Wheat. 304, and *Cohens v. Virginia*, 6 Wheat. 264, it will find that the great struggle, in those early days, was over the validity of the 25th section; distinguished counsel, in those cases, urging that the United States Constitution did not confer upon Congress the power to review and reverse a decision of the highest court of the State; that the jurisdiction, if conferred at all, must be original, not appellate.

It was not then, and we believe it has never before been doubted that Congress had the right to confer original jurisdiction, to the full extent of the judicial power of the United States, as declared by the Federal Constitution. Neither that instrument, nor the act of Congress, makes any restriction whatever in respect of that jurisdiction being original or appellate, nor in respect of the party by whom, or the circumstances under which the Federal question shall be raised, but grounds the jurisdiction upon the one fact of the existence of a case aris-

ing under the Federal laws or Constitution. The one condition is the existence of a Federal question; all other matters are left to Congress; and Congress, by adopting the exact phraseology of the Constitution itself, has seen fit to impose no restriction whatever, thus leaving it to the courts to determine whether any given case is one arising under the Federal laws or Constitution. If a Federal question is not part of the plaintiff's case, but of the defendant's, the plaintiff must by his pleadings, logically and substantially, show its existence; and if, in the progress of the case, it shall appear that such a question is really an essential ingredient thereof, the court rightly has jurisdiction to determine it; if it does not, ample provision is made for its dismissal or remand.

VI.

We reply, as briefly as possible, to the points made in the printed argument for defendants, under the head of "Other Matters of Defense;" pp. 30, *et seq.*

It is true that by the revenue act of 1889, the act of 1887 was repealed; but, as shown in that brief, sections 8 and 14 of the act of 1887 were literally re-enacted by the act of 1889; and the repealing clause of the act of 1889 expressly saved all taxes assessed under the act of 1887.

It is also true that by section 30 of chapter 26 of the Acts of the Extra Session of 1891, section 8 of the act of 1889 was amended; and that there was no express re-enactment of section 16 (said section 16 of the act of 1889 being itself a re-enactment of section 14 of the act of 1887, and those being the sections under which the State laid its taxes on the capital stock in all cases, in which, by the charter, the shares of stock were non-taxable.) Inasmuch as the Extra Session act of 1891, in certain particulars, amended the act of 1889, leaving the balance of the latter act undisturbed, we are not able

to perceive the force of the statement that there was no re-enactment of section 16. It needed no re-enactment. The whole of the act of 1889, except as amended, was left in full force. It certainly was not repealed by section 21 of chapter 26 of the Extra Session act—that section simply repealing all preceding acts in conflict therewith—that is to say, *in conflict with its own amending provisions;* undoubtedly leaving the act of 1889 in force, except as amended by the Extra Session act. It is difficult to understand the alleged "irreconcilable repugnancy" between the amending act and section 16 of the original act. Section 8 of the act of 1889 laid the taxes on the shares; section 16 provided that if the shares were, by charter, exempt, the capital stock should be taxed; and there is quite as much repugnancy between said sections 8 and 16 as between section 8 of the act of 1889, as amended by the act of 1891, and section 16. The supposed repugnancy, we must believe, is wholly imaginary.

C. V. Meredith
S. P. Walker
For appellants.

Office Supreme Court U. S.
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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

NO. 1021.

STATE OF TENNESSEE AND COUNTY OF SHELBY, Appellants,

VS.

BANK OF COMMERCE ET AL.

BRIEF FOR APPELLANTS.

C. W. METCALF,
S. P. WALKER,
Of Counsel.

Tracy Printing Company, Memphis.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

STATE OF TENNESSEE AND COUNTY OF SHELBY
vs.
BANK OF COMMERCE ET AL. } No. 1021.

Statement, Assignment of Errors, Brief and Argument for Appellants.

The bill in this case was filed in the Circuit Court of the United States for the Western District of Tennessee, to collect certain taxes alleged to be due from the defendant corporation, or its shareholders. The bank defends upon the ground that its franchises, capital stock and shares of stock are exempt from taxation, under its charter.

The charter has this clause: "Said institution shall have a lien on the stock for debts due it by the stockholders before, and in preference to other creditors, except the State for taxes, and shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes." A special question arises on the fact that the defendant bank, by

virtue of certain provisions of its charter to that end, has increased its capital stock from $200,000 to $1,000,000 since the adoption by the State of Tennessee, on May 5th, 1870, of its now Constitution. That Constitution requires (Art. II, Sec. 28) that all property, with certain exceptions not material here, should be taxed; and a special question of the case is, whether the new or increased capital stock, or the shares of stock, is or are taxable, regardless of the construction and legal effect of the charter above quoted.

The bank demurred to the bill upon the ground that the charter exempted the franchises, capital stock, and shares of stock, and that the legislation of the State, undertaking to tax either the one or the other, was in violation of that clause of the Constitution of the United States, which forbids the States to pass any law impairing the obligation of a contract.

The circuit judge sustained the demurrer and dismissed the bill, holding that the charter exempts the franchises, capital stock, and shares of stock, and that it as well protected the new stock subscribed and issued after the Constitution of 1870 as that subscribed and issued before the adoption of that Constitution. The State and county appealed.

ASSIGNMENT OF ERRORS.

Appellants assign errors in the decree below in the respects following, to-wit:

I.

In that said decree sustains the demurrer of the defendants and dismisses the bill herein. The said demurrer should have been overruled.

II.

In that it is ruled and adjudged by said decree that the capital stock and franchises of the defendant, the Bank of Commerce, is

exempt from all taxes by virtue of its charter. It should have been ruled that the charter of the defendant bank exempted only the shares of stock therein from any taxes other than the one-half of one per cent. stipulated to be paid under and by virtue of the charter.

III.

In that the said decree ruled and adjudged that the shares of stock in said bank were exempt from all taxes other than those stipulated to be paid by the charter; it should have been ruled that the shares of stock in said bank were subject to the taxing power of the State.

IV.

In that the court refused to rule that the State had power to tax the new or increased capital stock or shares of stock in said bank, subscribed and paid in after the adoption of the Constitution of the State of Tennessee, on May 5, 1870.

The court should have ruled that the Constitution aforesaid, and the legislation of the State in pursuance thereof, annulled and repealed all power on the part of the defendant bank to increase its capital stock, and to hold the same exempt from the taxing power of the State.

The State had power to tax either the capital paid in or the shares of stock issued after the adoption of the Constitution of the State, on May 5, 1870, and it should have been so ruled.

BRIEF.

I.

The appellants insist, primarily, that the charter tax in question is laid upon the shares of stock, and that the exemption is of

the shares; that the capital stock and franchises of the defendant bank are taxable.

This general question has been fully argued in the case submitted with this, to-wit, that of the State against the Union and Planters' Bank, No. 1020, and it would be useless to repeat the argument here.

II.

The language of this charter as quoted in the above statement possibly differentiates this case from that against the Union and Planters' Bank, and the conclusions reached in the two cases may be different, because of the different wording of the two charters.

III.

However the general question of charter exemption may be determined, the new or increased capital stock, or the shares of stock of the defendant bank subscribed and issued since the adoption of the State Constitution on the 5th of May, 1870, is or are taxable.

Morawetz on Corp., Secs. 1050, 1092, 21. 1045.
1 Beach on Corp., Secs. 15, 36.
R. R. vs. Heckt, 95. U. S., 170.
Ex-Parte N. R. R. Co., 37 Ala., 679.
Howard vs. Kentucky Ins. Co., 13 B. Mon., 282.
Bank, Etc vs. Okely, 4 Wheat. 235.
Aspinwall vs. Daviess, 22 How. 376.
Stone vs. Miss., 101 U. S., 814.
Memphis R. R. vs. Commissioners, 112 U. S., 621.
R. R. Co. vs. Allerton, 18 Wall. 235.
State vs. Bull, 16 Conn. 179.
Dartmouth College vs. Woodward, 4 Wh., 688.
Frost vs. Frostburg Coal Co., 24 How. 278.

IV.

The court below had jurisdiction, on the Federal question involved, and in respect of the amounts sued for by the complainants, respectively.

Memphis vs. Home Ins. Co., 7 Pickle, 558–564.

ARGUMENT.

I.

As stated in the brief, no argument will be here attempted upon the general question of the exemption of both the defendant corporation and its shareholders, by virtue of the charter. That question has been fully argued in the case against the Union and Planters' Bank.

There are, however, some differences between the charter here involved and that of the Union and Planters' Bank, which may or may not be essential differences, as the court may adjudge. The exemption clause of this charter reads thus: "The said institution shall have a lien on the stock for debts due it by the stockholders, before and in preference to other creditors, except the State for taxes, and shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes."

It will be observed that this charter differs from that of the Union and Planters' Bank in the declaration of a lien on the stock, in favor of the institution, for debts due it by the stockholders, in preference to all other creditors *except the State for taxes*, and that the annual tax of one-half of one per cent. is to be paid to the State on each share of capital, not on each share of capital *subscribed*, as in the Union and Planters' Bank case. In the argument of the Union and Planters' Bank case we have pointed out the stress laid by the court in the Farrington case, 95 U. S., upon the word "subscribed," the court evidently using the fact that the tax was laid

upon the stock subscribed, whether paid in or not, as one of the arguments to show that the charter tax was on the shares, for the reason that it would never be supposed that the State intended to tax the capital stock not paid in, as property.

The other and more striking point of difference lies in the fact that by this charter the institution is given "a lien on the stock for debts due it by the stockholders, before and in preference to other creditors, *except the State for taxes.*" Certainly it cannot be disputed that the taxes here referred to are taxes upon the shares; and we submit that it is equally clear that the prior right of the State for its taxes, reserved by the charter, does not refer to the annual charter tax of one-half of one per cent., but to *such general taxes as might, from year to year, be levied by the State.* It would be incongruous, not to say absurd, to suppose that the State reserved a priority of lien for taxes on the shares, meaning thereby the annual charter tax of one-half of one per cent., in preference to the lien of the institution for debts due it by its stockholders, when, by the same clause and in the same breath, it is provided that the annual charter tax of one-half of one per cent. should be paid by the institution itself; and this incongruity would exist whether the institution paid the charter tax vicariously, as was determined in the Farrington case, or for itself.

We submit that under the terms of this charter the tax is plainly on the capital stock; that the words "which shall be in lieu of all other taxes," mean in lieu of all other taxes on the capital stock; and that this meaning is unmistakably evident from the fact that the State reserved to itself a priority of lien for its taxes on the shares, the institution being required to pay one-half of one per cent. annually on the capital stock.

That this was the legislative intent is further emphasized by the fact that in the general revenue law of the same session of the

Legislature, by which this charter granted was (Chap. 74 of the Acts of 1856), the State expressly recognized the existence of certain charters by which the capital stock or property of the companies was exempt, but wholly failed to recognize any exemption of the shares of stock—the exemptions being declared in the second section of said Act, and the twelfth section thereof being as follows: "All capital stock or property of such incorporated companies as are exempt from taxation in their respective charters."

II.

In respect of the special question of power to tax either the capital stock or the shares of stock, so far as the capital stock has been increased since the Constitution of 1870, we are obliged to concede that we have found no direct authorities and must submit it to the judgment of the court upon such general and analogous principles as may be deemed material.

To put it in its simplest form, the question is whether the charter power to increase the capital from time to time (no limit being named in the charter) confers upon the corporation an unlimited irrepealable charter and contract right to withdraw property from the domain of the taxing power to and within the field of its charter exemption, without limit, and from time to time, as it may see proper.

Whilst it is generally true that the charter of a corporation is a contract, yet, it is also undeniably true that many things may be found in charters that are not accorded the protection of an irrevocable contract, but held to be revocable at the pleasure of the State.

The mode of serving process on the corporation, for example, has been held to be not a part of the contract, and repealable.

R. R. Co. vs Heckt, 95 U. S., 170.

Special remedies against delinquent shareholders have been also held repealable.

Ex-parte N. R. R. Co., 37 Ala., 679.
Howard vs. Ky., Ins Co., 13 B., Monr. 282.
Bank, etc., vs. Okely, 4 Wheaton, 235.

So, also, the power conferred in a railroad charter upon the counties through which it runs, to subscribe to its capital stock is undeniably repealable.

Aspinwall vs. County of Daviess, 22 How., 377.

So, also, it has been held that the State has the power to repeal "out and out" the charter of a lottery company, upon the ground that such a repealing power is within the reserved police power of the State.

Stone vs. Miss., 101 U. S., 814.

The question how far a charter will be treated as an irrepealable statute, because embodying a contract (1) as between the State and corporators or corporation, and (2) as to the corporators *inter sese*, is a question considered at length by Mr. Morawetz, from sections 1,050 to 1,092.

The language of this, as of other like charters, is to the effect that certain persons are thereby constituted a body politic and corporate, etc.; and the question is whether an unlimited right to enlarge *the number of associates* is part of the irrevocable contract. Can A, B, C, and D say that their charter contract with the State has been violated, if the State should undertake by a subsequent act to cut off an unlimited right of enlargement of membership? Or, stating it in still other terms, the question is whether A, B, C, and D, having embarked a certain amount of capital in the charter enterprise, can successfully say that the unacted on right of bring-

ing in other capital, without limit as to the amount, is itself a part of the irrepealable contract. We submit that it is not, but that on the contrary that part of the charter should be considered a mere privilege, or license, withdrawable until acted on, at the pleasure of the State, by any general or special law, effective to that end.

The court is fully aware that in the early decisions touching the question of the power of the Legislature to contract away the taxing power of the State, the proposition was met by a very formidable dissent from some of the ablest judges on this bench; and that some of them never ceased to dissent so long as dissent was decorous. Upon the same line of argument that was pursued by these dissenting judges, it might here be very formidably urged that, notwithstanding the now accepted doctrine that the State may, by special charter, grant an immunity from taxation to such extent as the terms of the charter import, yet that the Legislature *had no power* to confer upon a private corporation the right to withdraw taxable property from the fields of taxation and into the limits of immunity—*thus giving the corporation itself the irrepealable power to exempt banking capital from taxation.*

So long as the Legislature saw fit to leave a power of that sort unrepealed, it might be well considered that the increase of capital stock, from time to time, was fairly to be deemed the act of the Legislature; but to say that this delegation of authority to increase the capital stock without limit, is irrepealable, is to put quite another phase on the matter. In the case of

Memphis R. R. Co. vs. Commissioners, 112 U. S. 621,

Judge Matthews said: "In many, if not most, acts of incorporation, however special in their nature, there are various provisions which are matters of general law and not of contract,' and are therefore subject to modification or repeal. Such, in our opinion, would be the character of the right of the mortgage bondholders,

or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration, it had been conferred in express terms, and particular provision had been made as to the mode of procedure to affect the purpose. *It would be a matter of law and not of contract.*" And in *Railway Company vs. Allerton*, 18 Wall. 235, Bradley, J., speaking of the mode of increasing the capital stock, refers to it as a matter affecting "the extent of its constituency or membership."

In respect of the power to tax this increased stock, either as capital stock in the hands of the bank, or as shares of stock in the hands of the stockholders, we submit that the same should be affirmed for the reasons:

First, that the charter in this respect, not having been acted upon, was purely executory, and therefore withdrawable at the pleasure of the State.

"A grant of corporation franchises does not become effective and binding unless accepted by the grantees. No rights can be claimed under the charter until after it has been accepted by the grantees."

Morawetz on Corp. Sec. 21, 1045.

"The offer of a charter of incorporation by the State remains open for a reasonable time only, and if not accepted within a reasonable time, its legal effect expires."

State vs Bull, 16 Conn., 179.

"The charter of a private corporation, being a contract between the State and the incorporators, its acceptance by the latter is requisite to give it full force and effect. * * * * The charter takes effect immediately upon its acceptance by the incorporators."

1 Beach on Corp., Sec. 15.
Dartmouth College vs. Woodward, 4 Wheat., 688.
Frost vs. Frostburg Coal Co., 24 How., 278.

In order to show a consummated contract between the State and the corporation it is necessary for the latter to establish. "First, the grant of franchises by the State: secondly, acceptance of the franchises by the grantee: and, thirdly, the formation of the corporation association by the grantee."

Morawetz on Corporations, Sec. 37.

In many of the constitutions of the States it has been assumed, without question, that the State has undoubted power to annul any charter that has not been accepted, and an organization thereunder effected. The proposition is thus stated by Mr. Beach: "In others (meaning other States) all existing charters or grants of special or exclusive privileges under which a *bona fide* organization has not taken place at the time of the adoption of the Constitution are declared to be void."

Beach on Corporations, Sec. 36.

If it be true that the State can withdraw the whole of a charter that has not been accepted by the corporators, it must be also true that it can withdraw any part thereof that remains executory, unacted upon, and not a part of the contract rights conferred upon the corporation.

Second—That it is exceedingly doubtful whether it was competent, in the first instance, for the Legislature to have granted an immunity from taxation to an unlimited amount of banking capital. But, passing that doubt, and treating each increase of capital stock as in legal effect, the act of the Legislature, so long as the legislation stood unrepealed, it was certainly not competent for the Legislature irrepealably to have granted to the corporation the authority,

from time to time, and without limit, to bring banking capital within the scope of its exemption, as against a withdrawal of the authority by the State.

Third—That this charter, providing for an increase of the capital stock from time to time, and the manner thereof, is not, in that particular, a contract between the State and the corporators. The charter does not, in express terms, give the right to increase the capital stock to an unlimited amount. It merely confers the right of increase, and is silent as to the amount. *The silence* of the charter as to the amount of the increase does not confer a contract right, as against the repealing power of the State, to increase the capital *ad libitum*. It afforded the right, so long as the State saw fit to put no limit upon the amount, but will not be considered as an irrevocable contract right to increase the capital stock without limit. Without regard to the Constitution of 1870, the State could, by legislative act, have put an end at any time to the further increase of the capital stock.

It is true that neither the Constitution of 1870, nor any legislative act of the State undertook, *in terms*, to repeal or annul the charter exemption of the increased capital stock. That Constitution did, however, in legal effect, annul the exemption clause of the charter by declaring, in absolute and unqualified terms, that *all property* (with exceptions not material here) must be taxed. And at every biennial session of that Legislature, since that Constitution, such exemptions as were recognized or authorized by the Constitution have been declared, and all other property expressly subjected to taxation; and, by those same legislative acts, it has been invariably enacted that either the capital stock or the shares of stock of banking corporations should be taxed, according to value, alike with other taxable property of the State. In short, both by the constitutional provision and legislative acts, it is clear beyond question, that the shares of stock in the defendant bank

are, primarily, taxed by the State; and that, if the shares be exempt, the capital stock is taxed. So that the question is, not whether the legislation of the State is sufficient to impose the tax in question, but whether the State has lost its power so to do by virtue of a charter exemption, beyond the power of repeal or interference on the part of the State.

It is certain that the State, since the Constitution of 1870, could not have granted such an exemption, either by original act of incorporation, or by the revivor of an exemption once existing, but extinguished.

Trask vs. McGuire, 18 Wall, 391–405.
Memphis vs. Memphis City Bank, 7 Pickle, 574.

And it would seem necessarily to follow that all existing exemptions which the State had power to annul or withdraw are annulled, both by the Constitution and the legislative acts above referred to. In the annulment of existing exemptions the Constitution of 1870 is self-executing, to the extent that the State had power to annul them.

II.

The general question of jurisdiction is the same in this case as in that against the Union and Planters' Bank, No. 1020, heard with it. One point, however, is suggested by the defense in this case that does not arise in that, to-wit, that the court below had no jurisdiction to adjudge the question of power to tax the shares of stock, nor jurisdiction of the defendant shareholder, Fargason, because of the insufficiency of the amount claimed against him. So far as concerns the point, that the court had no power to adjudge the taxability of the shares of stock, we submit that it is clearly not tenable By the 12th section of the act of 1887 (quoted in the bill, transcript 2, 3) the bank itself is liable for

the taxes laid on the shares, because of its failure, out of dividends declared, to retain and pay the taxes as required by that section (transcript page, 4). It is shown by the bill (transcript page 4) that the amounts due to the State for the years 1888 and 1889 from the shareholders, on the theory of the taxation of the shares, is the sum of $2,787.8c, and to the county, for the same years, the sum of $6,423.20.

In order to establish the liability of the bank, under said section 12 of the Act of 1887, it is necessary to adjudge the liability of the shareholders, and the consequent liability of the bank, for the failure to pay the taxes out of the dividends declared and disbursed.

So far as concerns the amount claimed against the defendant, Fargason, we admit that neither the State nor the county, severally, has a claim against him for as much as $2,000. on account of taxes for the years 1888 and 1889.

We suggest, however, that in any aspect of this special jurisdictional question the bill is maintainable, it appearing that the capital stock of the defendant bank amounts to $1,000,000; that its executive officers have refused to disclose the names of its stockholders, and that the State is unable, without discovery, to give their names, or the amounts of taxes due from them respectively. The right of discovery, in such a case, was expressly affirmed by the Supreme Court of Tennessee in

Memphis vs. Home Ins. Co., 7 Pickle. 558-564

In that case the court said: "Discovery is a proper remedy in such a case; yet the complainant might as appropriately and more speedily collect its revenues by proceeding directly against the corporation for a sufficiency of the dividends which the law (Acts 1887, Ch. 2, Sec. 10; Acts 1839, Ch. 96, Sec. 12; Acts, Extra

Session, 1891, Ch. 26, Sec. 7) requires it to retain for the payment of taxes on the shares. Especially would such a practice be more speedy than the remedy by discovery, if the corporation be a dividend paying concern."

It is in this bill expressly averred (Transcript 4) that the defendant bank had declared and paid out to its stockholders a dividend of ten per cent. for each of the years 1888 and 1889, which averment is of course admitted by the demurrer.

Discovery was refused by the court below solely upon the ground that the complainants were entitled to no relief whatever, because of the charter exemption.

In respect, therefore, of the amounts claimed by the complainants, severally, the jurisdiction is maintainable because of the alleged liability of the corporation for the taxes due from the shareholders; and because it is apparent from the entire bill that the amount claimed from the defendant Fargason, for the taxes of *all the years embraced by the bill* would exceed the jurisdictional amount; and because, upon the general scope of the bill, the court will presume that the amounts involved, as against the shareholders, are sufficient. At all events, the court will not allow the jurisdiction to be defeated, on the question of the amount involved, until discovery shall be made as prayed for, and it shall then appear that the amounts claimed are insufficient.

C. W. Metcalf

S. P. Walker

For appellants.

Office Supreme Court U. S.
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JAN 8 1894
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Supreme Court of the United States

OCTOBER TERM, 1893.

Nos. 1020 & 1021.

State of Tennessee et al. v. The Union and Planters Bank et al.

State of Tennessee et al. v. Bank of Commerce et al.

COPIES OF

CERTAIN CONSTITUTIONAL AND STATUTORY LAWS

OF THE STATE OF TENNESSEE,

FILED BY APPELLANTS.

S. C. TOOF & CO., PRS. & LITHS., MEMPHIS.

COPIES OF

Certain Constitutional and Statutory Revenue Laws

OF THE STATE OF TENNESSEE.

Copy of Sec. 28 of Art. II of the Constitution of 1834.

All lands liable to taxation, held by deed, grant or entry, town lots, *bank stock*, slaves between the ages of twelve and fifty years, and such other property as the Legislature may from time to time deem expedient, *shall be taxable.* All property shall be taxed according to its value; that value to be ascertained in such manner as the Legislature shall direct, so that the same shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value. But the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct. A tax on white polls shall be laid, in such manner and of such amount, as may be prescribed by law.

Copy of Sec. 28 of Art. II of the Constitution of 1870.

All property, real, personal or mixed, *shall be taxed*, but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational; and shall except one thousand dollars worth of personal property in the hands of each taxpayer, and the direct product of

the soil, in the hands of the producer, and his immediate vendee. All property shall be taxed according to its value; that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. But the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct. The portion of a merchant's capital, used in the purchase of merchandise sold by him to non-residents, and sent beyond the State, shall not be taxed higher than the *ad valorem* tax on property. The Legislature shall have the power to levy a tax upon incomes derived from stocks and bonds that are not taxed *ad valorem*. All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State.

Chapter 13, Acts of 1835.

Sec. 1. All lands in this State held by deed, grant, entry or dower, and town lots other than such as are exempted from taxation as hereinafter provided, all slaves between the ages of twelve and fifty years, all pleasure carriages and *bank stock other than such as may be exempted from taxation as hereinafter provided*, shall be subject to the payment of an annual tax of five cents on every hundred dollars of the value thereof, as hereinafter ascertained; and in ascertaining the value of said lands and town lots, all improvements thereon, which are attached to, and constitute a part of, the freehold, shall be included.

Sec. 2. All lands within the State now held, or which may hereafter be held, by any person or persons for the use of any religious society, for the purpose of having thereon any church, meetinghouse, or other building for public worship; all lands

which have heretofore been, or may hereafter be, appropriated for the use of schools, or which may be held by any person or persons in trust for the use of any college, academy, or other seminary of education in this State; all courthouses, jails, poorhouses, almshouses, together with the real and personal property belonging thereto; all public streets, alleys, promenades and public walks in the different towns of the State; all graveyards; public roads of all classes; all stocks owned by the State, or by literary, religious or charitable institutions; *all capital stock or property of all such incorporated companies as have heretofore been, or may hereafter be, exempted from taxation in their respective charters of incorporation*, and carryalls, shall be, and the same are hereby, exempted from the payment of any State, county or other tax.

Chapter 115 of the Acts of 1844.

AN ACT to preserve the faith and credit of the State, to raise revenue, and to preclude the necessity of reducing the amount distributed annually, under the existing laws, for the support of common schools. (Passed Jan. 19, 1844.)

Sec. 1. That money or capital loaned or deposited at interest, or used in shaving notes or other evidences of a debt, and *all stock of individual resident stockholders in all the incorporated companies*, be added to the list of property enumerated in the revenue act of 1835–6, chapter 13, section 1; and that the State tax on all such property enumerated in said act, as well as that herein added thereto, shall hereafter be the sum of seven and a half cents on the hundred dollars just value thereof; and that the State tax on merchants and all other privileges and occupations enumerated in the said act of 1835–6, and all other acts subsequent thereto, shall be increased in the like proportion. But nothing in this act contained shall be construed in contravention of other acts of the present General Assembly relative to any of the subjects of taxation herein specified.

Chapter 74—Acts of 1855-6.

AN ACT to amend the revenue laws of this State, and to provide for a proper assessment.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That a yearly tax of ten (10) cents on every hundred dollars shall be assessed on: 1. All lands and town lots, to be estimated at its real value in money, * * *

* * * * * * *

all capital loaned or deposited at interest, *and all stocks.*

Sec. 2. *Be it further enacted*, That the following property shall be exempt from taxation, viz.: * * *

* * * * * * * * * *

12. *All capital stock, or property of all such incorporated companies as are exempt from taxation in their respective charters.*

Copy of Sections 541 and 542 of the Code of 1858—the only Code ever adopted by the State of Tennessee.

ARTICLE III.

Sec. 541. The following property shall be taxable, except such as is declared exempt from taxation in the next section:

1. All lands and town lots.

* * * * * * *

9. All investments, by inhabitants of this State, in stocks out of the State.

10. *All other stocks.*

ARTICLE IV.

PROPERTY EXEMPT FROM TAXATION.

Sec. 542. Of the property above enumerated the following shall be exempt from taxation:

1. Lands ceded to the United States, and the buildings and other property placed thereon while used by the government for the public service.

* * * * * * *

13. *All capital or property of every incorporated company, exempt from taxation in its charter.*

Chapter 45—Acts of 1868-9.

AN ACT to amend the revenue laws of the State.

Section 9. *Be it further enacted*, That no tax shall hereafter be assessed upon the capital of any bank or banking association, or any other joint stock company organized under the authority of this State or of the United States; but the stockholders in such banks and banking associations, or other corporations, shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of the State, county or municipal taxes at the place, town, ward or district where such bank or banking association, or other corporation, is located, and not elsewhere, whether the said stockholder reside in said place, town, ward or district or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in the State;

And provided further, That nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association, or other corporation; but the same shall be subject to State, county, municipal and other taxation, to the same extent and rate, and in the same manner, as other real estate is taxed.

1869-70—Chapter 81.

Section 1. That from and after the passage of this act, all real estate other than such as is properly exempted from taxation by section five hundred and forty-two (542) of the Code, as also all personal property, towit: Stallions, mares, geldings, mules, jacks, jennets, neat cattle, sheep and hogs, exceeding in value the sum of one thousand dollars; also, all moneys secured by mortgage or deed of trust, money in actual or constructive possession, money due from solvent debtors, whether by bond, bill single, promissory notes or judgments; also, all

articles of agreement for the payment of money and accounts on solvent parties bearing interest, owned or possessed by any person or persons whatsoever, except notes or bills for work and labor done; also, *all shares of stock in any bank, institution or company, now or hereafter incorporated by or in pursuance of any law of this State, or of any other State;* and all public bonds or stocks whatsoever, other than bonds of the United States, which, by the laws of the United States, are expressly exempted from taxation; * * * together with all other sources of revenue and property, real and personal, now taxable by the laws of this State, except what is exempted by this act, shall be valued and assessed, and subject to taxation for all State and county purposes.

By chapter 117 of the assessment law of 1873, section 9 of the act of 1868–9 was re-enacted, the same becoming section 8 of the latter act.

At the biennial session of the General Assembly of the year 1875, the assessment law of 1873 was left in force with certain amendments, not material to these cases.

Again, in 1877, certain amendments, not material to these cases, were made of the general assessment law.

Again, in 1879, no material change in the assessment law was made.

By chapter 171 of the Acts of 1881, a general assessment law was enacted; and section 9 of the Acts of 1868–9 was in substance re-enacted as section 8 thereof.

By chapter 105 of the Acts of 1883, the State again enacted a general assessment law, and section 9 of the preceding law was in substance re-enacted as section 8 thereof.

By chapter 1 of the Acts of 1885, a general assessment law was again enacted by the State, the title and 8th section of which were the same as those of the preceding general assessment law.

The 12th section thereof is as follows:

"Sec. 12. *Be it further enacted*, That for the purpose of collecting such taxes, and in addition to any other laws of this State relative to the imposition and collection of taxes, it shall be the duty of the president or managing officer of every such bank, or other corporation, doing business in this State, to retain so much of any dividend or interest belonging to such stockholder or bondholder as may be necessary to pay any and all taxes assessed in pursuance of this act, until it shall be made to appear to such officers that said taxes have been paid."

In the year 1887 the State again enacted a general assessment law, the same being chapter 2 of the Acts of that year. The title, 8th, and 12th sections thereof were the same as those of the preceding assessment law.

The 14th section thereof is as follows:

"Sec. 14. *Be it further enacted*, That this act shall not be so construed, and shall not so operate, as to exonerate or release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation, but it is hereby enacted that in all cases where such stock is exempted, such company or corporation shall be assessed in such way as may be lawful; and in all cases in which, by the terms or legal effect of the charter, the shares in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of stock is fixed and prescribed, and

declared to be in lieu of all other taxes, taxes for State, county and municipal purposes shall be assessed and levied at a rate uniform with the rate levied upon other taxable property, upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus."

Office Supreme Court U. S.
FILED.
JAN 5 1894
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

STATE OF TENNESSEE AND SHELBY COUNTY

vs. } No 1020

UNION & PLANTERS BANK OF MEMPHIS ET ALS.

Brief for Defendants.

Henry Craft

T. B. Turley

J. C. TOOF & CO., PRS. & LITHS., MEMPHIS.

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RES ADJUDICATA.

The first view of the case which we propose to consider, turns upon the case of *Farrington v. Tennessee*, 95 U. S., p. 679. The contention is as to the meaning and interpretation of that case.

Strong, J., in dissenting opinion, page 693, thus states the question involved:

"After all, the true question in these cases is, whether a contract in express terms between the State and a corporation, to exempt its property and franchise from taxation, shall, by construction, extend to and exempt the property of individual stockholders, property which, for the purpose of taxation, is entirely different from that of the corporation."

This statement concedes that, by the charter contract, the property and franchises of the bank were exempt beyond the charter tax; and considers the only question to be as to exemption of shares of stock in hands of stockholders.

In this statement of the question the dissenting opinion followed the Supreme Court of Tennessee when the case was decided there. *Memphis v. Farrington*, 8 Baxter, p. 539. In that case, on page 553, the opinion says:

"The simple question really is whether a contract, in express terms, between the State and the corporate individual, to exempt the property of the corporation, shall, by construction, extend to and exempt the property of that other individual, the stockholder."

The opinion of the court, as delivered by Swayne, J., does not state the question in precisely the same way, but, we submit, that the case was considered and decided as presenting simply the questions stated in the dissenting opinion, and in the opinion of the Supreme Court of Tennessee. We mean to say that the reasoning of Judge Swayne proceeds upon the concession that, clearly, the franchise and property of the corporation were exempt, beyond the charter tax; and that the only question was whether the shares of stock, in the hands of stockholders, were also exempt. We submit, too, that much of the difference of opinion about the true meaning of the decision, and much of the obscurity that has been supposed to overhang the opinion, will be removed by bearing in mind the precise form of the question involved, as it was in the mind of Judge Swayne while considering the case.

At any rate the reasoning of the Supreme Court of Tennessee, and of the dissenting opinion as delivered by Judge Strong, as well as of the opinion delivered by Justice Swayne, demonstrate that the charter tax of one-half of one per cent. must be the limit of power to tax the bank itself, or its property or franchise; and the only question considered or decided in those opinions was as to the power to tax the shares in hands of stockholders. Indeed it is urged on behalf of the complainants, in the case now at bar, that the liability of the

shareholders to taxation was the only question decided by this court speaking through Justice Swayne. It is conceded that the decision announced by Justice Swayne is *res adjudicata*, or at least a plenary decision, that the stock in the hands of stockholders can not be taxed. The act of 1887, passed by the Legislature of Tennessee, is, upon its face, meant to concede this, and bases upon the non-liability of the shareholders, its provision for taxing the company, as is here sought to be done. This involves the fundamental error of supposing that in the case of *Farrington v. Tenn.* this court fixed the meaning of the charter contract to be an acceptance by the State of the one-half of one per cent. as in lieu of all other taxes upon the stock held by stockholders, leaving undecided the liability of the bank itself, its franchise and property, to any further taxation.

The concession of the bill, following the act of 1887, under which the tax is assessed, is, that a tax can not be enforced against the bank, and also against the shareholders on their stock; and the claim is that, as the shareholders are exempt under *Farrington v. Tenn.*, the bank itself is not exempt, the exemption having spent itself in behalf of shareholders. We desire, therefore, to briefly analyze the opinion of Justice Swayne in *Farrington v. Tenn.* If, by that decision, it is settled that the bank itself is exempt from further taxation by virtue of the contract tax of one-half of one per cent., and that the shareholders are exempt by virtue of the words in lieu of all other taxes, it must follow that complainants can not recover at all.

Judge Swayne thus states the case:

"The tenth section of the charter of the bank declares, 'that the said company shall pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes.' The

State of Tennessee, and the county of Shelby, claiming the right, under the revenue law of the State, to tax the stock of the plaintiff in error, assessed and taxed it for the year 1872. * * * * The plaintiff in error denies the right of the State and county to impose these taxes. He claims that the tenth section of the charter was a contract between the State and the bank; that any other tax than that therein specified is expressly forbidden; and that the revenue laws imposing the taxes in question impair the obligation of the contract."

On pages 682 to 686 he states the general views and principles of construction involved, and proceeds: "Can the exemption here in question, examined by the light of these rules, be held valid?"

The "exemption here in question" was of course the claim of plaintiff in error, as he had stated it, towit:

"He claims that the tenth section of the charter was a contract between the State and the bank; that any other tax than that therein specified is expressly forbidden; and that the revenue laws imposing the taxes in question impair the obligation of the contract." He proceeds: "Upon looking into the section, several things appear. 1. The tax specified is upon each share of stock, and not upon the capital stock itself. 2. It is upon each share subscribed; nothing is said about what is paid in upon it. That is immaterial; the fact of subscription is the test, and that alone is sufficient. 3. This tax is declared to be in lieu of all other taxes. Such was the contract of the parties."

He then considers the general rules as to taxation which apply to corporations and, on page 688, continues:

"When this charter was granted the State might have been silent as to taxation. In that case the power would have been unfettered. *The Providence Bank v. Billings*, 4 Peters 514.

It might have reserved the power as to some things and yielded it as to others. It had the power to make its own terms, or to refuse the charter. It chose to stipulate for a specified tax on the shares, and declared and bound itself that 'this tax should be in lieu of all other taxes.' * * But the State has, by her revenue laws, imposed another and an additional tax on the same shares. This is one of the 'other taxes' which it had stipulated to forego. The identity of the thing doubly taxed is not affected by the fact that in one case the tax is to be paid vicariously by the bank, and in the other by the owner of the shares himself. The thing thus taxed is still the same, and the second tax is expressly forbidden by the contract of the parties. After the most careful consideration we can come to no other conclusion. Such, we think, must have been the intent and understanding of the parties when the charter was granted, and the bank organized. Any other view would ignore the covenant that the tax specified should be 'in lieu of all other taxes.' It would blot those terms from the context, and construe it as if they were not a part of it."

"There is no reservation or discrimination as to any 'other tax.' All are alike included. Such is the natural effect of the language used. The most subtle casuistry to the contrary is unavailing. Under such a contract between individuals, a doubt could not have existed. It may as well be said the power is reserved to tax anything else as further to tax the shares. We can not so hold, without interpolating into the clause a term which it does not contain. This we may not do. Our duty is to enforce the contract as we find it, and not make a new one. If it was intended to make the exception claimed from the universality of the exemption as expressed, it would have been easy to say so, and it is fairly to be presumed this would have been done. In the absence of this

expression, we can find no evidence of such an intent. Our view is fully sustained by the leading authorities upon the subject. We will refer to a few of them. * * *The Union Bank v. The State*, 9 Yerg. Tenn. 490, is a case marked by eminent judicial ability and careful thought. There it was stipulated that 'in consideration of the privileges granted by the charter, the bank agrees to pay to the State annually the one-half of one per cent. on the amount of the capital stock paid in by stockholders other than the State.' It was held that a further tax on the capital stock was void, but that the State might tax the shares in the hands of individuals. In the case before us, the charter tax is upon the shares. The tax complained of is a further tax upon the shares. Without the phrase 'in lieu of all other taxes,' the parallelism is complete. A further tax could no more be imposed upon the shares in one case than upon the capital stock in the other. The same negative considerations apply to both." This reference to and comment upon the 9 Yerger case, we submit, clearly indicates the view entertained by Judge Swayne of the question which he was then considering. In the 9 Yerger case there were no words of exemption in the charter. Judge Swayne said: "Without the phrase 'in lieu of all other taxes' the parallelism is complete." In the 9 Yerger case the charter tax was "one-half of one per cent. on the amount of the capital stock paid in." In *Farrington v. Tenn.* the charter tax was "one-half of one per cent. on each share of the capital stock subscribed." That is, the charter tax was laid, in the 9 Yerger case, upon the capital stock, and in the case of *Farrington v. Tenn.* on the shares of stock. Judge Swayne says: "A further tax could no more be imposed upon the shares in one case (the Farrington case) than upon the capital stock in the other (the 9 Yerger case)." He adds: "The same negative considerations apply to both." "The negative considerations" were of course that, in both cases

(the words, "in lieu of all other taxes," being left out) the Legislature was estopped, by the contract, to impose a further tax upon the capital stock in the one case, and on the shares of stock in the other; for the reason that upon these the charter tax, as a consideration for the franchise, had been laid.

From this, as we understand the opinion, it results that without the words "in lieu of all other taxes," the further tax upon the shares could not have been imposed which was sought to be imposed in the Farrington case. The parallelism of the cases was that the subject of taxation in the two cases upon which the charter tax had been imposed, towit, the capital stock in the one, and the shares of stock in the other, were exempt from further taxation without the phrase "in lieu of all other taxes." Here the parallelism ceased. "The phrase in lieu of all other taxes" was not in the 9 Yerger case, and therefore, in that case the shares of stock were held to be taxable. That phrase was in the Farrington case, and the clear logical deduction is that under that phrase in the Farrington case the capital stock could not be taxed. We submit that in the former part of the opinion Judge Swayne has worked out the conclusion that, in the Farrington case, the shares of stock there sought to be taxed were fully protected by "the phrase in lieu of all other taxes;" and here, in the comment upon the 9 Yerger case, he worked out the further conclusion that the shares of stock would have been equally protected without that phrase.

In the 9 Yerger case the court was asked, by the agreement of counsel, to decide whether either the capital stock or the shares could be taxed, and to render a judgment according to the decision. The court was of opinion that the Legislature had not undertaken to tax the capital stock, and had no power to tax it; but that the shares were subject to the tax, and, indeed, were what the tax had been imposed upon.

In the Farrington case the attempt was, specifically, to reach the shares. The State Supreme Court decided that the capital stock was exempt from further taxation by the phrase "in lieu of all other taxes;" but that the whole force of the phrase was, in that exemption, exhausted; and therefore the shares might be taxed. By this court that decision was reversed in the opinion delived by Judge Swayne, and the shares held to be exempt, upon the ground we have stated. No opinion was called for as to the capital stock, and none was directly announced. We have endeavored to show, however, that the case did proceed, both in the State court and in this court, upon the concession that the capital stock could not be taxed. The language of the opinion, as we have hereinbefore quoted it, we submit is an implied decision in accord with that concession. It said: "It (the State) chose to stipulate for a specified tax on the shares, and declared and bound itself that this tax should be in lieu of all other taxes." * * Any other view (than the exemption of the shares) would ignore the covenant that the tax specified should be in lieu of all other taxes. It would blot those terms from the context, and construe it as if they were not a part of it.

"There is no reservation or discrimination as to any 'other tax;' all are alike included. Such is the natural effect of the language used. * * * It may as well be said the power is reserved to tax anything else, as to further tax the shares. We can not so hold without interpolating into the clause a term which it does not contain. This we may not do. Our duty is to enforce the contract as we find it, and not to make a new one. If it was intended to make the exception claimed from the universality of the exemption as expressed, it would have been easy to say so, and it is fairly to be presumed that this would have been done. In the absence of this expression, we can find no evidence of such an intent." Stronger language

could not have been used to describe "the universality of the exemption," and to say of any tax whatever, beyond the charter tax, "all are alike included."

In the case now under consideration it is assumed that both the capital stock, and the shares of stock, are not exempt beyond the charter tax, and the court is called upon to fix liability upon either the one or the other. The act of 1887, of the Tennessee Legislature, under which the tax was assessed, assumes that both can not be taxed. An assessment on both was attempted in order that the court might declare and enforce either the one or the other. The effort is made to obtain if possible the reconsideration and overruling of the Farrington case, or, at least, such interpretation of that case as will establish liability of either capital stock, or shares. If that case makes the question *res judicata* to any extent whatever, of course a decision to that effect leaves no open question as to so much as was by that case settled.

The court will observe that the Farrington case was, and the case at bar is, each a proceeding by the State of Tennessee, and the county of Shelby, to enforce the collection of taxes against the Union and Planters Bank; and, in both, the chief question was and is the construction of the charter of that bank. The Farrington case, it is true, was against the stockholders, while this tax is against both the bank and the stockholders; and the particular tax sued for is not the same. The subject matter, however, in both cases, is the construction of the charter. We claim that the construction established in the Farrington case is *res judicata*. What that construction was we have sought thus far to ascertain as an original question. It is the construction which the Supreme Court of Tennessee has in several cases put upon it. This record shows that, at its April term, 1892, that Supreme

Court reviewed the whole subject, and its opinion is reported in *Memphis v. U. and P. Bank*, 91 Tenn. p. 546.

The court will see from this record that the Supreme Court of Tennessee, at the April term, 1876, had before it not only the Farrington case in which the State and county were complainants, but also another case against him in which the city of Memphis was complainant. It was the city case in which the opinion, reported in 8 Baxter Tenn., p. 539, was delivered, and the same decision was entered in that and the case of the State and county. It was the State and county case that was taken to the Supreme Court of the U. S. and decided, 95 U. S., p. 679. The stipulation of record entered in the city case, shown in this record, was that the judgment of the Supreme Court in the State and county case should be conclusive of the city case, and that the judgment to be entered in the State and county case, upon the mandate of the Supreme Court of the U. S., should also be entered in the city case; all of which was carried into effect. It was in a proceeding by the State, for the use of the city, that the opinion in 91 Tenn. 546 was announced. That case of course was finally settled by that opinion. Although it was for specified taxes, we assume that for all time it concludes the city upon the question of any taxation, as to this bank, beyond the charter tax. It was a suit against both the bank and the stockholders, as the case at bar is. The Supreme Court of the State, in that opinion, states the case as follows, page 548:

"The primary claim of this bill, and of complainant's counsel at the bar, is, that the charter tax of one-half of one per cent. was laid on shares of stock, and that the words 'which shall be in lieu of all other taxes' relate alone to shares of stock; that those words were used for the sole purpose of expressing the legislative intent to exempt the shares

of stock from further taxation, and not with a view of granting any exemption to the capital stock of the corporation.

"In the alternative the shares of stock are alleged to be liable to taxation if the capital stock should be held to be exempt under the charter.

"The bill concedes the exemption of the one or the other, but denies that both are exempt.

"Demurrants assert that, by a proper construction of the charter, both shares of stock, and capital stock, are exempt, absolutely, from all taxation except the one-half of one per cent. expressly prescribed."

The court therefore clearly had before it, so far as the city is concerned, the question of the taxability of both capital stock and shares, and it decided that both were not taxable beyond the charter tax.

The court, after stating the general rules of law applicable to the question, says as follows, (page 551):

"In view of the foregoing rules, we should have no hesitation, if the question were *res integra*, in holding that the provision of this charter does not exempt capital stock and also shares of stock from other taxation than that named; for, to our minds, the words of the grant do not indubitably manifest an intention to exempt both from taxation."

The court then cites its former decision in which it was proceeding upon the idea that the words (in lieu of all other taxes) related to capital stock, and exempted it from all other assessment, and the decision of the court in the Farrington case. It then proceeds:

"Since the decision of the Farrington case by the Supreme Court of the U. S., this court has uniformly adhered to its previous holding that no *ad valorem* tax can lawfully be laid on the capital stock, and, in recognition of that decision, has

gone further and said that shares of stock are likewise exempt from other taxation than that prescribed in the charter."

The court then reviews these decisions, cites and considers *Bank v. Tenn.*, 104 U. S. 493, and continues, page (455):

"Considering the decisions of the Supreme Court of the U. S. in *Farrington v. Tenn.*, 95 U. S. 679 and in *Bank v. Tenn.*, 104 U. S. 493 together; and giving them the controlling weight to which they are entitled, it can not be held otherwise than that the charter tax of one-half of one per cent. is in lieu of all other taxes, whether against the bank or the capital stock, or against owners of the shares of stock. Under the construction there given the charter exemption includes both." On page 556 the opinion continues:

"Complainant seeks, in addition to what has already been stated, to recover from the bank $1800 as privilege taxes for the years 1889, 1890 and 1891. These taxes are claimed from the corporation for the right of exercising its franchise—for the privilege of doing a banking business. Manifestly the charter tax was intended to cover this right or privilege. The language of the charter implies that, in consideration of the public good, and the payment of the tax therein specified, the State will allow the corporation to exercise the franchise granted without further taxation. *City of Memphis v. Hernando Ins. Co.*, 6 Baxter 527; *Union Bank v. State*, 9 Yerger 490. * * * The charter tax was imposed primarily as a consideration for the corporate franchises, and the right to exercise them. No other construction can be placed upon the words of the charter.

"The State is bound by its contract, and so likewise is the city of Memphis, which is but an arm or agency of the government. This is true not only as to privilege taxes, but also with respect to other taxes claimed in this case. All subjects of taxation covered by the charter tax are exempt from fur-

ther assessment, whether made in behalf of the State and county, or municipality.

"As to those subjects the specified tax is in lieu of all other taxes, State, county and municipal; such is the undoubted meaning of the contract.

"*City of Memphis v. Hernando Ins. Co.*, 6 Bax. 527.
"*Union Bank v. State*, 9 Yerg. 490.
"*Nashville v. Thomas*, 5 Cold. 600."

It thus appears that the charter provisions considered by this court in this case have been fully considered and construed by the Supreme Court of Tennessee by decisions extending over a long period of years, and uniformly, that court has held that by these provisions, the franchises and property of the corporation are exempt from all taxation beyond the charter tax. This court has not reviewed, and has had no power to review, these decisions. They have become crystallized into fixed constructions by the State, of its own statute, and into laws of property. When, in the Farrington case, it was held by the State court that the shares of stock, notwithstanding these provisions, might be taxed, the case was brought here upon the ground that the obligation of the contract was impaired; and the decision was reversed.

This court cannot fail to observe, upon an examination of these cases, that exactly the same result had been reached by the State court in the case of *Union Bank v. The State*, 9 Yerg. 490, where the charter did not contain the words "in lieu of all other taxes." The force of Judge Swayne's exposition of the 9 Yerg. case thus becomes apparent, and the accuracy of his statement in the Farrington case that, "without the phrase 'in lieu of all other taxes,' the parallelism is complete." The payment of the charter tax had, in all the former cases, been held to exclude further taxation upon property and franchises. In the case reported in 91 Tenn. 546, it was said, as we have

already quoted, "All subjects of taxation covered by the charter tax are exempt from further assessment." In the Farrington case it became necessary, for the first time, to determine the force and effect of the phrase "in lieu of all other taxes." The Supreme Court of Tennessee held that the shares of stock were not protected by that phrase; and when the case was here this court, through Judge Swayne, reversed that decision, and said "any other construction would ignore the covenant that the tax specified should be 'in lieu of all other taxes.' It would blot those terms from the context, and construe it as if they were not a part of it."

Certainly if it has, as thus shown, become the settled law of Tennessee, and was before this charter was made, that the charter tax itself protects all the subjects of that tax, there was no use for the phrase, "in lieu of all other taxes," unless it was intended to protect shares of stock. It will not do to say that the phrase means in lieu of all other taxes upon the same subjects of taxation, for those subjects have immunity without the phrase, as the Tennessee court decided in the 9 Yerg. case, and has decided in all the cases, and emphatically reasserted as quoted above in the case in 91 Tenn. Nor will it do to ignore this phrase, nor blot it out from the context. The phrase constitutes, in the forcible language of Judge Swayne, a "covenant." We submit, therefore, that this court will not disregard the long line of Tennessee decisions by which it is held that the capital stock of this bank cannot be further taxed. We submit further that it will not reverse its own well-considered decision, reversing the State court, and now adopted by the State court, that the shares of stock cannot be further taxed. Whether the questions are to be considered as technically *res judicata* or not, the answers have been fully and authoritatively given by long-established and well-reasoned precedents.

Cromwell v. County of Sac, 94 U. S. 351.

Black v. Bourbon Co. Com'rs, 99 U. S. 686; 121 U. S. 525; 101 U. S. 638.

In the Farrington case, 95 U. S., p. 688, last paragraph, Judge Swayne says:

"But the State has by her revenue law imposed another and an additional tax on these same shares. This is one of those other taxes which it had stipulated to forego."

We suggest that the words "one of those other taxes" is significant. If it had been in his mind that the exemption of the charter applied only to shares of stock, he would have said "that other tax"; and so we may add, if the Legislature had intended only to exempt the shares, the language of the charter would have been "in lieu of any other tax." Judge Swayne, we submit, here finds the true meaning of the charter to be that the exemption was from all other taxes that could in any way be assessed upon the corporation or the stock, or the property and franchises of the corporation.

New Orleans v. Houston, 119 U. S., p. 265, is very much like the case at bar in the language of the exemption, and in the devices by which the Legislature sought to destroy or escape it.

JURISDICTION.

The jurisdiction of the Circuit Court of the U. S. in this case is claimed solely upon the allegation that it involves a "Federal question," and the statement of what that Federal question is.

We may concede that when a Federal question is involved the jurisdiction arises, and even that, *prima facie*, the jurisdiction is made out by the allegation that such question is involved. To make a Federal question under the clause of the Constitution of the U. S., relating to the impairment of

the obligation of contracts, we submit that it must appear, not only that State legislation has been enacted, but that such legislation has been upheld as valid by the State court. *R. R. Co. v. Rock*, 4 Wall. 177–181, cited in 142 U. S. 282–286. The simple allegation that the court will be called upon, in the progress of the case, by defendant to determine whether the legislation upon which the suit is founded is not void because it impairs the obligation of the contract, does not seem to state a case in any way arising under the Constitution or the laws of the U. S. That Constitution, or those laws, have no relation whatever to complainant's case as giving the right of action, or as securing the aid or intervention of the Federal court.

In *Cook v. Avery*, 147 U. S. 375, on page 386, Fuller, Chief Justice, says: "Clearly the right of a plaintiff to sue cannot depend upon the defence which the defendant may choose to set up."

In *R. R. Co. v. Rock*, 4 Wall. 177, Miller, Justice, says, p. 181:

"It must be the Constitution, or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the U. S., and the decision of the court must sustain the law or Constitution of the State in the matter in which the conflict is supposed to exist, or the case for this court does not arise."

See also *Wynne v. Morris*, 20 Howard 3.
Williams v. Norris, 2 Wheaton 117.

If, in the progress of the case, defendant should interpose no such defence, and raise no such question, but should rely wholly upon that provision of the State Constitution which prohibits the making of laws that impair the obligation of contracts (see Constitution of Tenn., Art. I, Sec. 20), what would become of the jurisdiction of the Federal court? Com

plainants cannot raise a question only to ask the court to demolish it. If the averments made in this bill will give jurisdiction to the Federal court, the State courts would be deprived of their privilege to pass upon the validity of the statutes of the States in such matters, and deprived of the opportunity to set the State right if it has erred. Hence, an essential element in the Federal question is that the judiciary of the State has upheld the legislative usurpation. If, when jurisdiction has been taken upon the allegation of a Federal question, it shall be made to appear that there is really no Federal question, in the legal sense, the jurisdiction assumed will be denied by this court of its own motion. We submit that it has been made thus to appear by this record. In the Farrington case a stockholder of this bank did complain of the action of the State court and sought, as he had the right to do, and obtained, redress in this court. The State court has since conformed its judgment, upon another presentation of the question, to the judgment of this court. That last judgment remains in force. Complainants could not bring it here, but seek to review and reverse it by another suit, brought in the Federal court, and we submit the Federal question alleged does not exist. This case is brought by the State and county for their taxes, and the other was by the State for the use of the city of Memphis for the city taxes. Both are based upon the same State legislation, and thus involved the identical contract rights which, in the other case, the State court recognized and protected from impairment.

R. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, was an attempt to remove from a State to a Federal court, as we may say "*quia timent.*" This court said:

"The presumption in all cases is that the courts of the States will do what the Constitution and the laws of the U. S. require, and removals cannot be effected to the courts of

the U. S. because of fear that they will not," and further: "It is not enough that in other cases decisions have been made which, if followed in this, will be erroneous. Until the error has actually been committed in this, a Federal question has not become involved." Earlier in this opinion it was said: "To allow a removal upon such grounds would be to say that a suit arises under the Constitution and laws of the U. S., whenever the public acts of one State are to be construed in an action pending in another State."

Here complainants, in order to make the jurisdiction, anticipate the defence, and *quia timent* ask the Federal court to adjudicate that the legislation in question does not impair the obligation of the contract. The fact that if the case were in the State court, and it should there be decided that the obligation of the contract is impaired, complainants could not bring the matter here for review, shows that they cannot now call upon the Federal court, by a suit brought in that court, to decide the question, there being no other jurisdictional element. The State cannot turn its back upon its own courts upon the ground of its fear that these courts will hold its legislation invalid, and force defendants into the Federal courts upon that ground. *A fortiori*, when it appears that the State court has already adjudicated that the legislation is invalid, because it impairs the obligation of the contract, will this court retain the jurisdiction taken solely on the ground that there was a Federal question? Even if the case were in this court upon other and sufficient jurisdictional grounds, and the question had arisen as to the validity of the legislation, this court would be bound under the rules it has prescribed for itself, to follow the construction by the State court of its own statute, and this would be so even if the decision had been made in a case between wholly different parties. *Post v. Supervisors*, 105 U. S. 667.

"It is the province of the Supreme Court of the State to construe its own Constitution and laws, and when it decides that one of its laws is not authorized by its Constitution, it is not for us to deny the correctness of the decision, when there is no evasion, in this way, of Federal authority."

Boyd v. Alabama, 94 U. S. 645, on p. 649.
Gormly v. Clark, 134 U. S. 338–348.
Bank v. Bank, 136 U. S. 223.

This court has further decided that it is not for Federal courts, in maintaining their jurisdiction, to presume that the State court will not properly discharge its duty. The presumption is the other way.

R. R. Co. v. Wiggins Ferry Co., 108 U. S. 18.
Neal v. Delaware, 103 U. S. 370–389.

To appeal to the Federal court (with no other ground of jurisdiction) to prevent the State court from shirking its obligation; and, *a fortiori*, when it appears that, in other cases, the State court has really protected the obligation of the contract involved from impairment, is an attempt to evade the limitations upon the jurisdiction of the Federal courts in cases between citizens of same State.

Shreveport v. Cole, 129 U. S. 36.

Whether there is a contract, and whether State legislation impairs the obligations of that contract, are, of course, questions which, when properly brought before it, this court is especially authorized to decide, and to decide for itself, without regard to the action of the State court.

In dissenting opinion, 1 Wallace, bottom of page 210, Miller, J., said: "The only special charge which this court has over contracts, beyond any other court, is to declare, judicially, whether the statutes of a State impair their obligation."

To this extent this court certainly has a charge beyond any other court.

Hoadley v. San Francisco, 124 U. S. 639.
Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683–697.
N. O. Water Works v. Sugar Co., 125 U. S. 18 (p. 36).

But, we submit, it is the party claiming, or whose defense is, that the obligation of a contract has been impaired, or is sought to be impaired, by legislation, who can invoke this Federal jurisdiction, and that he can only invoke it when the State court has upheld the legislation complained of. It seems at least very strange that a State should call upon a Federal court, by an original proceeding, to take jurisdiction of a case upon the sole ground that the case involves a question arising (not under the laws or Constitution of the U. S., but) under its own laws and Constitution. Let us concede for the argument that if there were the additional allegation that its own court had upheld the laws involved as being valid, under the Constitution of the U. S., the jurisdiction would be made out. It is surely necessary that such allegation should be made. But if, instead, it were alleged that its own courts have held the laws to be invalid because of a prohibition of the Constitution of the U. S., just as surely, we submit, the jurisdiction would be defeated. The case would be one which could not be removed from the State court to this court by writ of error, nor from State court to Circuit Court because of Federal question. There would be no Federal question. Then there is no Federal question as ground for the jurisdiction of the Circuit Court.

In 146 U. S., p. 294, this court, in stating the Federal question, said: "But in this case the (State) court passed upon the action of the authorities in virtue of a legislative act approved more than fifty years after the making of the supposed contract, and explicitly upheld the law.

"It has been often decided by this court that a suit may be said to arise under the Constitution or laws of the U. S., within the meaning of that act, even when the Federal question upon which it depends is raised, for the first time in the suit, by the answer or plea of the defendant. But these were removal cases, in each of which the grounds of Federal jurisdiction were disclosed either in the pleadings, or in the petition, or affidavit for removal; in other words, the case at the time the jurisdiction of the Circuit Court of the U. S. attached, by removal, clearly presented a question or questions of a Federal nature. *R. R. Co. v. Miss.*, 102 U. S. 135–140; *Ames v. Kansas*, 111 U. S. 449–462; *Pacific R. R. Removal Cases*, 115 U. S. 1–11; *Southern Pacific R. R. Co. v. California*, 118 U. S. 109–112." "Where, however, the original jurisdiction of a Circuit Court of the U. S. is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration, or the bill of the party suing, that the suit is of that character: in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit: just as it would remand to the State court a suit which the record at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It can not retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind. If the city had not answered in the present suit, and judgment by default had been rendered against it, this court, upon writ of error, would have been compelled to

reverse the judgment, upon the ground that the record did not show jurisdiction in the Circuit Court."

Metcalf v. Watertown, 128 U. S. 586, 588–9.

See also: *Carson v. Dunham*, 121 U. S. 421–426.

In *Knox v. Exchange Bank*, 12 Wall. 379, the court said, on page 383, "But there it was the statute that worked the injury, and it was the judgment of the State court holding the statute valid, which gave this court jurisdiction."

And the court said, in *Bank v. Buckingham's Ex'rs*, 5 Howard 317, p. 342, "But grant that the decision of that court (the State) could have this effect, it would not make a case for the jurisdiction of this court, whose aid can be invoked only when an act alleged to be repugnant to the Constitution of the United States has been decided by the State court to be valid, and not when an act admitted to be valid has been misconstrued by the court." Further, on same page, the opinion proceeds: "If this court were to assume jurisdiction of this case it is evident that the question submitted for our jurisdiction would be, not whether the statutes of Ohio are repugnant to the Constitution of the United States, but whether the Supreme Court of Ohio has erred in its construction of them. It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them, on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

There is and can be no claim of original jurisdiction of the Circuit Court of the United States in this case, except the allegation that the case arises under the Constitution or

laws of the United States. What is a case so arising has been clearly defined by this court. *Germania Ins. Co. v. Wisconsin*, 119 U. S. p. 473; *Removal Cases*, 115 U. S. 2–11; *Starin v. New York*, 115 U. S. 248–257. In the latter case the court says: "If from the question it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution, or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not." The decisions are cited. It is, we think, very clear that this case does not in any way come within this definition.

The language of the act of 1875 is as broad as the provision of the Constitution which extends the judicial power of the United States "to all cases in law and equity arising under it, the law of the United States, and treaties made under their authority," 112 U. S. p. 415. Chief Justice Marshall held in 9 Wheaton p. 823, "that when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Court jurisdiction of that cause." It was held in that case that the jurisdiction was conferred by the bank charter. The Chief Justice went further, however, on page 821, and said: "Original jurisdiction, so far as the Constitution gives a rule, is co-extensive with the judicial power. We find in the Constitution no prohibition to its exercise."

It is immaterial, however, whether this jurisdiction comes in such cases directly from the Constitution, or from the act of Congress, for the definition of a case arising under the Constitution or laws of the U. S. does not include this case. That definition, as quoted above, is, substantially, the defini-

tion given by C. J. Marshall. Our contention then is that the jurisdiction of the case cannot come, either from the Constitution, or the act of 1875, or the act of 1887, as a case arising under the Constitution or laws of the U. S. The case so far as it can involve a Federal question pertains altogether to the clause of the Constitution which prohibits the enactment of laws by a State impairing the obligation of contracts, and the legislation of the State making the particular contract with the bank, and the effect of the subsequent act of 1887 upon the contract. Of course we do not, and need not, deny that the Circuit Court might decide these questions in a case of which it otherwise had jurisdiction. The point is that the mere fact that the case does involve these questions does not confer jurisdiction, when jurisdiction does not otherwise exist. We insist that Congress has made special provision for the enforcement of the impairment clause of the Constitution in the 25th section of the judiciary act of 1789, carried into Revised Statutes as section 709, as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute or authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the U. S., and the decision is in favor of their validity, * * * may be examined and reversed or affirmed in the Supreme Court upon a writ of error."

C. J. Marshall said in *Cohens v. Virginia*, 6 Wheaton, p. 379: "Congress seems to have intended to give its own construction to this part of the Constitution in the 25th section of the judiciary act."

He may not have intended to refer to the question we are now discussing, but we adopt the remark, and submit that Congress, by this 25th section, has indicated that it was only

under this 25th section that the Federal court can acquire jurisdiction of the particular cases therein enumerated, when jurisdiction depends wholly upon the matter of the controversy. Hence we argue that the repugnancy of a State statute to the impairment clause of the Constitution can not become an independent ground of Federal jurisdiction, until the validity of the statute in question shall have been sustained by the State court. This would, it is true, exclude all Federal jurisdiction resting solely on that ground, whether original in the Circuit Court, or by removal to that court from the State court, and such is the logic of our argument. But it will be said no doubt that the Circuit Court has taken jurisdiction, by removal upon that ground, of cases that went through the Supreme Court without criticism; as the case of *Brown v. Houston*, 114 U. S. p. 622; *Tennessee v. Whitworth*, 117 U. S. p. 129; and also of cases by original jurisdiction, as in the case of *New Orleans v. Houston*, 119 U. S. p. 265. In these cases no question of jurisdiction was made. Upon our view of the law, objection, if made, would have prevailed.

Moreover it is to be remarked that in those cases the parties invoking Federal jurisdiction were the parties insisting upon the repugnancy of the State statute to the constitutional provision.

So far as we know the precise question we now discuss has not been passed upon by this court. We have referred to cases which have come to this court by writ of error to State courts, as showing that, in such cases the essential element of the jurisdiction is that the State court should have sustained the validity of the State statute complained of. We have referred to the 25th section of the judiciary act of 1789 to show that Congress, in adopting that section, intended to confine the Federal jurisdiction to the particular cases therein enumerated, and to the particular mode of procedure therein described.

This section is special, affirmative legislation as to cases involving the question of the repugnancy of statutes to constitutional provisions. It undertakes to provide for such cases, and it is to be assumed, under the proper rules of construing affirmative words, that a "negative or exclusive sense must be given to them."

Marbury v. Madison, 1 Cranch 174.
Cohens v. Virginia, 6 Wheaton 394–5.

"The court may imply a negative from affirmative words, when the implication promotes, not when it defeats, the intention." 6 Wheat. 398.

The intention of section 25 of the judiciary act was to give the Supreme Court of the U. S. a supervising jurisdiction over the final judgment or decree of the State court in which were drawn in question rights claimed under the Constitution, laws or treaties of the U. S., or in which the validity of the State statutes was drawn in question on the ground of repugnancy to the Constitution of the U. S. It was part of a system adopted by Congress for the distribution of Federal judicial power, under the Constitution, among the various courts. The system recognized two general heads of jurisdiction, as said by C. J. Marshall, 6 Wheaton 398: "In one description of cases the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case is nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these the nature of the case is everything, the character of the parties is nothing."

As growing out of the relation of the States to the national government, and of the States to each other, the character of the parties is the rule, and the character of the case is the

exception. Diversity of citizenship is the fundamental predicate of Federal or judicial power among litigants. That the Constitution and laws of the U. S. shall be the supreme law, uniformly administered, and upheld by adequate authority, is an equally important, but wholly distinct, purpose and function of the courts of the U. S., not to be trammeled by considerations of the character of the litigants, but to stand directly and independently upon the character of the case. So far as the repugnancy clause of the Constitution is concerned it is evident that section 25 of the judiciary act makes plenary provision, as it insures the ultimate judgment of the Supreme Court in cases arising in State courts, whenever those courts shall sustain the validity of statute or authority of the State claimed to be repugnant to the Constitution of the U. S.; and this without any limitation on account of the pecuniary importance of the litigation.

The same section provides for the same appellate jurisdiction over judgments and decrees of the State courts in which are drawn in question, and denied, rights claimed under the Constitution or laws of the U. S. The section recognizes the distinction or difference between cases under the repugnancy clause and cases under the Constitution and laws of the U. S.

We can readily understand why, in this section, the jurisdiction was made to attach only when the State court had upheld the statute or authority of which repugnance was sought to be predicated. The writ of error was to run to the highest State court which could decide the case, and if the court had decided against the statute or authority, it had done so in the exercise of its acknowledged prerogative. The Constitution was vindicated without the aid of its authorized and ultimate expounders. The design of the section was to make sure the supremacy of the Constitution. The importance of the end to be obtained warranted the creation of this appellate

jurisdiction over the courts of the States, as a jurisdiction depending entirely upon the character of the case. But the section providing for it was made to recognize the delicacy of the intrusion upon the domain of the State judiciary by limiting the jurisdiction to the cases in which that judiciary had sustained the statute or authority against the claim of repugnancy to the Constitution. Is it too much to say, in this view, that the section 25 was a construction placed by Congress upon this part of the Constitution, and an admission, fully borne out by reason, that no jurisdiction, either appellate, as provided by the section, or original, as claimed by the bill in this case, resting solely upon the character of the case, ought to be created which did not require the State court to first pass upon the question? Even if the case could be held to be one arising under the laws or Constitution of the U. S. ought it not to be an essential element of the transgression alleged against the State that its courts have sustained the action? and especially ought it to be competent, as is here attempted, for the State to implead its own citizens upon the allegation that it has passed a law operating upon a previously made contract, which is a valid law under the Constitution of the United States? or to go a step further, still within the record, ought it to be competent for the State to implead its own citizens, when it appears that its own highest court has, by solemn judgment, condemned, for repugnancy to the Constitution of the United States, the State law which that State seeks by its suit in the Federal court to enforce?

It was said by the court in *Ames v. Kansas*, 111 U. S. p. 469, that the jurisdiction here sought to be invoked was first given by the act of 1875 in the words of the act, "that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or equity * * arising

under the Constitution or laws of the United States." We have seen that the case at bar is not a case so arising. Indeed the act of 1875 shows upon its face that it is not; for following the distinction which had been recognized in section 25 of the judiciary act between those cases and cases under the repugnancy clause, it expressly confers the jurisdiction in cases arising under the Constitution or laws of the United States, and leaves untouched those arising as a separate class, under the repugnancy clause. This is, we submit, another congressional construction of the Constitution. Rather, it is an expressed purpose not to extend the jurisdiction of the Circuit Court, either original or by removal, to cases under the repugnancy clause. The act of 1887 upon the same subject follows the same purpose. It makes the original jurisdiction and the jurisdiction by removal correlative or co-extensive, but still omits cases arising under the repugnancy clause. So Congress has seen fit to leave the cases under the repugnancy clause, so far as jurisdiction, depending solely upon the character of the case, is concerned, as they were left by the judiciary act of 1789.

We claim then—

That this is not a case arising under the Constitution or laws of the U. S.;

Or, if by any implication or construction it can be so considered, that it will be subjected to the limitation of section 25 of the act of 1789 because it does not appear that the State court has sustained the validity of the State statute drawn into question;

Or, that, both of these propositions being untenable, the suit can not be maintained by the party *asserting* the validity of said State law; especially when the record shows that the State court has held the State law in question to be invalid.

Certainly the acts of 1875 and 1887 were not passed to *extend* the jurisdiction of the Federal court, and especially, not to enlarge the scope of the rule which burdened the Supreme Court.

OTHER MATTERS OF DEFENSE.

We consider, without restating them, the matters of defense set up in the answer, under the Constitution and laws of Tennessee.

In the fore front of this bill is put the legislation of 1887. The Legislature there undertook to enact that where, by charter provision, the stock of a corporation should be exempt from taxation in the hands of the company, it should be taxed in the hands of the stockholders; and where, in the same way, exempt in the hands of the stockholders, it should be taxed in the hands of the company. But the act goes further and provides, in section 14:

In cases "in which a rate of taxation on the shares of stock is fixed and prescribed, and declared to be in lieu of all other taxes, taxes for State, county and municipal purposes shall be assessed and levied at a rate uniform with the rate levied upon other taxable property, upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as equal to the aggregate market value of all the shares of stock in said corporations, including the net surplus."

This section 14 of the act of 1887 was, of course, intended to reach the capital stock of the specified corporations and make them exceptions to the long-established policy of the State which had led to the express exemption in all the revenue laws of the capital stock in the hands of all corporations. The report of the case of *Farrington v. Tennessee*, in 95 U. S., on page 680, quotes as part of section 1 of the Act of 1869–70:

"All *shares of stock* in any bank, institution or company, now or hereafter incorporated by or in pursuance of any law of this State or any other State * * * shall be valued and assessed, and subject to taxation."

This policy has been ever since adhered to. Another clause of the act of 1869--70, as quoted by the court in *Memphis v. Farrington*, 8 Baxter, on page 540, is:

"That no tax shall be hereafter assessed upon the capital of any bank or banking association, or any other joint stock company, organized under the authority of the State or of the United States," etc.

This has been substantially re-enacted in every revenue law since passed, and is re-enacted by the act of 1887 as its section 8. Under this policy taxes were assessed as provided in all the laws, against the *stockholders upon the shares of stock held by them*. In this case, therefore, the capital stock of the Union and Planters Bank, in the hands of the corporation, is exempt from taxation under general law, without any such immunity from the charter, unless the Legislature has succeeded in excepting it out of the provisions of the general law; and section 14 of the act of 1887 is the only ground upon which such exception can be claimed.

The act of 1887, including the section 14, was expressly repealed by the act of 1889. The language, in the latter part of section 86 of the act of 1889 is:

"And also chapter 2, of the act of 1887, approved March 26, 1887, be and the same is hereby repealed. This repeal shall operate as to all taxes assessed under this act, but shall not operate so as to interfere with the taxes assessed prior to the passage of this act, except as hereinbefore especially provided."

This act of 1889 took effect January 1, 1890.

But section 14 of the act of 1887 was re-enacted as a part of (section 16) the act of 1889, as was section 8, and perhaps other portions. The revenue legislation since 1889 has been confined to amendments of chapters 96 and 130 of the act of 1889, and has been had wholly at the extra sessions of 1890 and 1891. (See chapters 27 and 29 of the Acts of Extra Session of 1890, and chapters 25 and 26 of the Acts of Extra Session of 1891).

By section 30 of chapter 26 of the Acts of Extra Session of 1891, section 8 of the act of 1889 is amended so as to read: "That no tax shall hereafter be assessed upon the capital of any bank or banking association * * * but the stockholders in such banks or banking associations shall be assessed and taxed," etc.; being a re-enactment, with some changes, of what had been section 8 of the act of 1887, as well as of the act of 1889. There is, however, no re-enactment of, nor reference to, section 16 of the act of 1889, which was section 14 of the act of 1887. Section 21 of this chapter 26 of the Acts of Extra Session of 1891 is as follows:

"Sec. 21. Be it further enacted, That any and all laws in conflict with this act be, and the same are hereby repealed, and that this act take effect from and after its passage, the public welfare requiring it."

This act was approved September 21, 1891. We submit that section 16 of the act of 1889 (which was section 14 of the act of 1887) was repealed by this act of 1891, because it was in conflict with that act, and is not kept alive by any saving or reservation. The repugnancy is irreconcilable.

If this act of 1887 is to except the capital stock of the Union & Planters Bank, in the hands of the corporation, out of the exemption of the general law, it would do so under the clause, "or in which a rate of taxation on the shares of

stock is fixed and prescribed, and declared to be in lieu of all other taxes." The immunity clause of our charter is, in *hæc verba*, recited by the bill, making it plain that a rate of taxation of "one-half of one per cent. on each share of stock subscribed," is fixed and prescribed, and declared to be in lieu of all other taxes.

The claim of the bill is, "that the charter tax of one-half of one per cent., to be paid to the State, is a tax upon the shares of stock," "and that the language, 'in lieu of all other taxes,' means in lieu of all other taxes on the shares of stock, and that it has no effect to exempt the capital stock of the corporation from taxation." It does not claim that both the shares of stock in the hands of the stockholders, and the capital stock in the hands of the corporation, were undertaken to be taxed by the legislation of the State, but that for and since the year 1887 the revenue laws of the State provided, generally, that the corporate property in the hands of the corporation should not be taxed, and that the shares of stock in such corporations should be assessed to, and taxed to, the shareholders at their market value; and that the capital stock in the hands of the corporation should be taxed if, by the charter provisions, the shares of stock were not subject to taxation.

If complainants are right in saying that the charter tax in this case is on the stock in the hands of the stockholders, and the words "in lieu of all other taxes" relate to that one subject of taxation, then the inquiry is confined to the validity of the tax assessed upon the capital stock in the hands of the company. It is conceded that this capital stock is exempt under the general law, unless the act of 1887 excepts it from that law.

The case, then, in this respect, is not a case in which stock and shares, or either stock or shares, are *exempt*, wholly or

partially. *There is no exemption.* A rate of taxation on the shares is fixed and prescribed. At that rate the tax has been regularly paid—$3000 per annum. Without the aid of the charter the capital stock in the hands of the bank is exempt by general law. Under the act of 1887 this bank (perhaps it might be the only bank in the State so taxed) must pay taxes *both* on its capital stock and the shares of it in the hands of holders. As an effort to tax thus invidiously, the act is unconstitutional. The rate of taxation has been fixed and prescribed by a contract between parties competent to contract. The bill shows it to be a rate very small in proportion to what it would or might be without the contract; but if, by circumstances, it should become double the general rate of taxation, the bank would be bound to pay it.

Section 14 of the act of 1887 declares its purpose to be: "That this act (section 8 of the act, no doubt) shall not be so construed, and shall not so operate, to exonerate or release from taxation any company or corporation whose charter *exempts* stock *and* shares thereof from taxation. The relative is made far larger than the antecedent when the purpose, thus limited, is made to include a case in which shares are taxed—not exempt—at a rate fixed and prescribed, which, on complainant's concession, is received in lieu of all other taxes on the shares, and puts the shares on the foot of taxable and tax-paying property at that rate, even if they should be utterly valueless. This clause of section 14 of acts of 1887 is, in this view, a deliberate and professed attempt to impair the obligation of a recognized contract by making it the ground for excepting this bank out of the exemption of its capital stock under the general law, and of causing it to be taxed both upon its shares and its capital stock against the policy and principles upon which the revenue laws of the State have so long proceeded.

Section 28, article 2, of the Constitution of Tennessee declares: "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value."

The act of 1887 directs that, when capital stock shall be taxed under its provisions, its value "shall be fixed and returned by the assessor as equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus."

This arbitrary rule is not the taxation *ad valorem*, uniform, and on the same footing as other like property of the same value required by the Constitution. It would be a fatal objection to it if there were no other—that it includes the net surplus in the valuation, which is in no sense a part of the capital stock, but is undivided profits belonging to the stockholders.

It is not competent under the Constitution and general law of Tennessee to tax both the capital stock and the shares of stock, by special taxation, of one corporation, or of one class of corporations.

The very foundation of the argument for complainants is, that the stockholders and corporation are distinct; that the capital stock belongs to the corporation, while the shares of stock belong to the stockholders. It is only because of this distinction that the capital stock and shares may both be taxed without creating double taxation. This being so, the corporation stands, with reference to taxation on its property and assets, just as other corporations do, and just as the citizens of the State do. Any *ad valorem* tax upon the corporate prop-

erty must be levied in accordance with the provisions of the Constitution of the State. The corporation is entitled to the full protection of section 28, article 2, of the Constitution. Its property must be taxed according to its value; that value must be ascertained in such a way as to make the tax levied an equal and uniform tax upon like property throughout the State. Its property cannot be assessed so as to make the tax levied on it higher than a like tax levied on similar property of the same value. In the light of this distinction, and these principles, the tax levied under section 14 of the act of 1887 is clearly unconstitutional. Certain specific banking corporations are selected by this section as objects of taxation. The property of these banks is taxed, while similar property, belonging to other banks of exactly the same character in the State, is wholly omitted from taxation. The section in question operates on probably five or six banks in the State, while no attempt is made to tax the property of the remaining banks doing business therein. This is attempted to be excused upon the theory that a certain small class of banks is selected, and the tax made equal and uniform as to them. It is true that a law may be general in its operations, even though it applies to but few individuals, if it applies to all individuals in that particular class. But this principle has no application to an *ad valorem* tax upon property, which is required by the Constitution to be equal and uniform throughout the State. The banks in question own real estate, choses in action, stocks and bonds just as other banks, and citizens of the State generally, own such property. Now, the Constitution requires that, when a tax is levied on real estate, or on stocks and bonds, or on any kind of personal property, it shall be an equal and uniform tax, applying to all such property in every part of the State.

This bank's ownership of property, in which its capital stock is invested, is of exactly the same character as the

ownership of every other bank and corporation of the State in like property, and as the ownership of every citizen of the State in like property. The fact that the shares representing its capital stock, which are the property of its stockholders, and which are not its property, have an exemption which distinguishes them from other corporate shares in the State, is no reason for holding that the bank's ownership of its capital stock is different from the general ownership of such property by other corporations and citizens of Tennessee. There can be no classification by which certain property can be selected for taxation, while other like property is omitted. This would destroy the equality and uniformity of the tax. Under our tax system a certain amount of personal property in the hands of every citizen is exempted from taxation. It might as well be said that a valid law could be passed denying every officeholder in the State of Tennessee the benefit of this exemption, or denying every red-headed man in the State of Tennessee its benefit, as to uphold the validity of the section 14 of the act of 1887.

But again, as already shown, the property in which the capital stock of this particular bank has been invested, is valued by a different rule from that which is applied to all other like property in the State. When citizens, or other corporations of like character as the one under consideration, own land or personalty, such land or personalty is that valued for taxation, but here the value of the land or personalty is gauged and fixed by the value of an entirely different class of property, towit: the shares of stock which belong to the stockholders of the corporation. By reason of the exemption of those shares from general taxation they may be of much greater value than the property in which the capital has been invested.

THE TAX IS REALLY ON THE SHARES.

If complainants are right in their general proposition that the exemption is to be confined to the shares, and does not protect the capital stock of the bank, then we say the tax levied under section 14 of the act of 1887 is really a tax upon the shares of stock, and not upon the capital. The rate is to be uniform with the rate levied on other taxable property, but, as already shown, the tax is fixed upon the value of the shares, and not upon the value of the property in which the capital is invested. As this court so well said in *Farrington v. Tenn.:* "The identity of the double tax is not affected by the fact that in one case it is to be paid vicariously by the bank, while in the other by the owner of the share himself." To illustrate: There is another bank in the city of Memphis doing business immediately opposite the Union and Planters Bank which has no exemption of any kind in its charter. This latter bank pays no tax on its capital stock, but its shareholders pay tax on the market value of their shares. Now, under the operation of section 14, the Union and Planters Bank vicariously pays for its shareholders a tax on the value of their shares. In both cases the tax is the same. In one case it is paid by the shareholder after he receives his dividends from the bank, and in the other case it is paid by the bank before any dividend is declared, and thus the dividend received by the shareholder is diminished to that extent.

Henry Craft
T. B. Turley
For Defendants

Office Supreme Court U. S.
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APPEAL

FROM THE

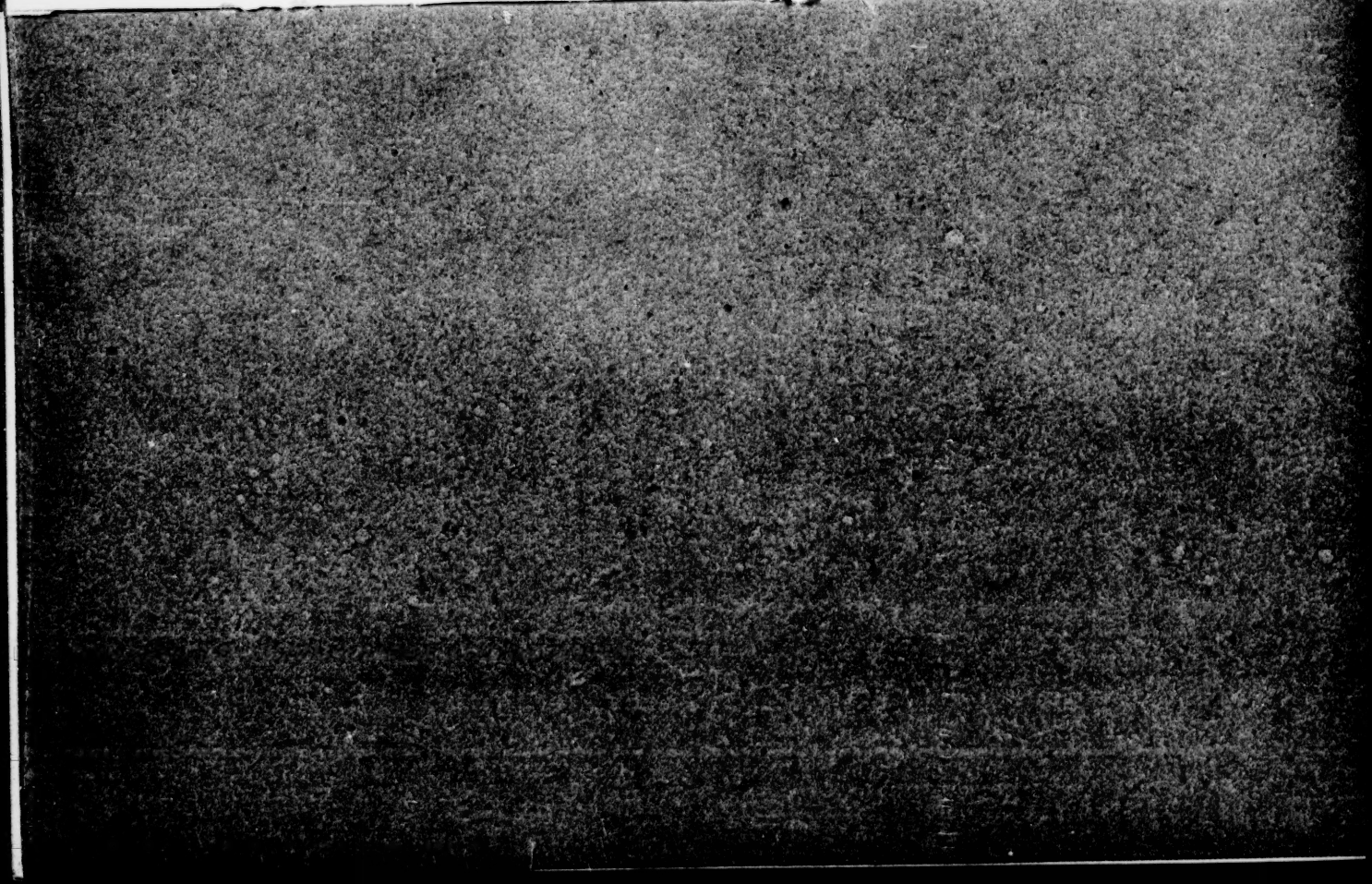
CIRCUIT COURT OF THE UNITED STATES,

WESTERN DISTRICT OF TENNESSEE.

STATE OF TENNESSEE ET AL.,
vs.
BANK OF COMMERCE ET AL.
} No. 1021

ARGUMENT FOR THE APPELLEES.

Tracy Printing Co., Memphis.



APPEAL

FROM THE

CIRCUIT COURT OF THE UNITED STATES,

WESTERN DISTRICT OF TENNESSEE.

STATE OF TENNESSEE ET AL.,
vs.
BANK OF COMMERCE ET AL.

STATEMENT OF THE CASE.

The State of Tennessee and the County of Shelby, claiming in the alternative that either the capital stock of the Bank of Commerce is taxable, or the shares of stock are, filed their bill for the purpose of having determined which of these subjects were liable to be taxed, and in the event that it should be determined that the former was, to recover the taxes alleged to be due for the years 1888 and 1889 on the capital stock from the bank; but if the latter, to recover from John T. Fargason, a stockholder in the bank, taxes as follows:

To the State for the year 1888, $299.0-, and for the year 1889, $397.50, and to the County, $678.30 for the year 1888, and $698.25 for the year 1889.

The bill asked also that the defendant, Omberg, the cashier of the bank, discover under oath "the names of all persons, firms,"

"or corporations, owning shares of stock in the bank, on the" "10th day of January of each and every year, and the amount" "held by each since, and including the year 1887."

The jurisdiction of the Federal Court was invoked upon allegations in the bill that "the defendant bank claims that under" "and by virtue of the terms of its charter both its shares of stock" "and its capital stock are exempt from taxation, except the one-" "half of one per cent, prescribed by the charter, and that the reve-" "nue laws of the State undertaking to tax one or the other, are" "void, because in violation of that clause in the Constitu-" "tion of the United States which forbids any State to pass any" "law impairing the obligation of a contract. It claims immu-" "nity from taxation upon that ground and upon no other."

It is also averred that since the adoption of the Tennessee Constitution, on the 5th day of May, 1870, the bank increased the capital stock from sixty thousand to a million dollars, "and that" "the new stock subscribed and issued since that date," "whatever may be the amount thereof, and aside from all other" "questions, is taxable."

The revenue laws of the State pertinent are, Sections 8, 12 and 14 of Chapter 2 of the Session Acts of 1887, copied in the appendix. The appellees interposed a demurrer to the bill, and it was dismissed.

ARGUMENT.

The Circuit Court of the United States is without jurisdiction to determine whether or not the shares of stock are subject to taxation as against the defendant John T. Fargason. The

jurisdictional amount is wanting, if it be conceded that the case is one rising under the Constitution of the United States.

Ex-Parte Phenix Ins. Co., 117 U. S., 369.
N. O. Pacific R'y vs. Parker, 143 U. S., 52.
Walter vs. Northeastern R. R. Co., 147 U. S., 373.

As to the controversy in the suit growing out of the refusal of the officers of the bank to disclose the names of their stockholders, it is not cognizable in equity in the Federal Court, the remedy by mandamus being the proper proceeding.

The construction of the charter of the Bank of Commerce has been settled judicially in Tennessee. Contract rights thereafter acquired are, by the construction, as fully to be protected as if in the letter of the text.

Bank vs. County, 128 U. S., 526.

This court having adjudged that under the charter no taxes can be collected of the corporation or its shareholders, other than one-half of one per cent. by the State of Tennessee, no federal question is raised by appellants.

If we are mistaken as to jurisdiction, the several acts of the Legislature levying taxes on the capital stock of the bank impair the obligation of the contract between the State and it. And the question is not now open to debate.

From the case in Tennessee in 9 Yerger, 493, to the latest adjudication of the question in 91 Tenn., 547, covering a period of 57 years, it has been ruled that a provision similar to the one in the charter of the Bank of Commerce is a contract, and any law or constitutional amendment imposing an additional tax upon the capital stock would impair its obligation.

In the first case decided, the provision in the charter of the

bank was in these words: "That in consideration of the privilege" "granted by the charter, the bank agrees to pay annually the" "one-half of one per cent. of the amount of the capital stock" "paid in by the stockholders other than the State."

The charter was granted in October, 1832. The capital stock was limited to $3,000,000. In 1834 the constitution of Tennessee was amended. Sec. 28, Art. 3, provided that all "bank stock and other property as the Legislature may, from" "time to time, deem expedient, shall be taxable; that all prop-" "erty shall be taxed according to its value, that value to be" "ascertained in such manner as the Legislature shall direct; so" "that the same shall be uniform throughout the State; that no" "one species of property from which a tax may be collected" "shall be taxed higher than any other species of property of equal" "value."

By the first section of the revenue act of 1836, in pursuance of the above provision of the new constitution, the Legislature declared that all bank stock, except such as thereafter shall be provided to be exempt, should be subject to an annual tax of five cents on the hundred dollars of its value. The second section of that act exempted, among other things, from taxation, the capital stock of such corporative companies as had theretofore been or might thereafter be exempted from taxation in their respective charters of incorporation.

Another act was passed at the same session providing that the revenue rising from bank stock shall be collected from the bank on the amount of stock paid into the vaults of the bank by the several shareholders in said bank or banks; and that it shall be the duty of the cashier to list the amounts paid in as stock owned in his or their bank by the several individual stockholders.

Under this constitutional provision and these enactments an

action of assumpsit was brought by the State of Tennessee against the Union Bank of Tennessee to recover the amount of taxes alleged to be due.

Delivering the opinion of the Supreme Court, Mr. Turley, Judge, among other things, said, "it has not been contended that a con-" "vention of the sovereign power of a State could, by an amend-" "ment of the constitution, do that which, by the constitution of" "the United States, the Legislature is prohibited from doing." "Neither, in our opinion, could it have been successfully con-' "tended for, for a contract once made is obligatory upon the" "parties thereto, in morals and in law, until it has been per-" "formed according to its spirit and meaning."

"We repudiate the idea that the convention of a State has more power to violate contracts than the Legislature; if it was otherwise, there would be no safety in times of excitement, under our form of government, for the most sacred rights."

This bank charter imposes a tax annually of one-half of one per cent. on each share of capital stock, "that shall be in lieu" "of all other taxes."

The argument is that the charter tax is on shares of stock, though the tax is required to be paid by the bank, taxes on the capital of the bank are not within its provisions.

The construction of the charter of the Bank of Commerce has been otherwise settled by a series of decisions in the Supreme Court of Tennessee, and this court.

In Memphis vs. Farrington, 8 Baxter, p. 539, Freeman, J., said: "The terms of the contract, then, mean that as to this" "property, thus assumed to be purchased, we stipulate for a tax"

"on it of only one-half of one per cent. on each share of capital"
"stock subscribed or paid in, which shall be in lieu of all other"
"taxes on this property; that is, the franchise or privilege, and"
"everything necessary to its enjoyment, including the use of the"
"capital stock for the purpose of the grant, and in case of banks"
"and the like institutions, the banking-house and other property"
"necessary for the carrying on of the business."

In reviewing it, this court said: "There is no question before"
"us as to the taxes imposed on the shares by the charter. But"
"the State has, by her revenue law, imposed another and an ad-"
"ditional tax on these same shares. This is one of those 'other"
"taxes' which it had stipulated to forego. The identity of the '"
"thing doubly taxed is not affected by the fact that in one case"
"the tax is to be vicariously paid by the bank, and in the other"
"by the owner of the share himself. The thing thus taxed is"
"still the same, and the second tax is expressly forbidden by the"
"contract of the parties. After the most careful consideration"
"we can come to no other conclusion. Such, we think, must"
"have been the understanding and intent of the parties when the"
"charter was granted and the bank organized. Any other view"
"would ignore the covenant that the tax specified should be 'in'
"lieu of all other taxes.'" It would blot those terms from the"
"context, and construe it as if they were not a part of it."

"'There is no reservation or discrimination as to any other"
"tax.' All are alike included. Such is the natural effect of the"
"language used. The most subtle casuistry to the contrary is"
"unavailing. Under such a contract between individuals, a doubt"
"could not have existed. It may as well be said the power is"
"reserved to tax anything else, as further to tax the shares. We"
"cannot so hold, without interpolating into the clause a term"
"which it does not contain. This we may not do. Our duty is"

"to enforce the contract as we find it, and not to make a new"
"one. If it was intended to make the exception claimed from"
"the universality of the exemption as expressed, it would have"
"been easy to say so, and it is fairly to be presumed this would"
"have been of such an intent. Our view is fully sustained by the"
"leading authorities upon the subject. We will refer to a few"
"of them."

The Supreme Court of the State of Tennessee held the exemption embraced and was confined to the franchise and capital stock, the property of the corporation. This court held that the capital stock and shares were one in the purview of the exemption.

The cases of the City of Memphis vs. William Farrington et al, the State of Tennessee vs. M. J. Wicks et al., and the City of Memphis vs. C. F. Fenner and the Bluff City Insurance Company et al., were fully considered and the several charters therein construed. Three years subsequent to these decisions by the Supreme Court of the State of Tennessee the construction of the same charters came before that court in the case of the DeSoto Bank.

There the question was whether that bank, with a stipulation in its charter providing "that the institution shall pay an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes whatever," * * * "and may"
"purchase and hold a lot of ground for the use of the institution"
"as a place of business, and at pleasure sell and exchange the"
"same," was liable to pay Municipal taxes on a lot it had purchased, and thereon erected a building, a part of which it occupied for its business. The court adjudged the exemption was limited to that part of the building used, and necessary for carrying on business, and the residue of the property was subject to taxation.

At the same term of the court the charter of this bank was again construed in the case of

The City of Memphis vs. the Hernando Insurance Co. et al., 6 Baxter, supra,

Chief Justice Nicholson delivering the opinion of the court, after quoting the exemption clause of the charter as follows: "Said institution shall pay to the State an annual tax of one-half" "of one per cent. on each share of capital stock, which shall be in" "lieu of all other taxes," said, "the language used by the Legis-" "lature in giving expression to its intention in the two first" "named charters, is too explicit and comprehensive to ad-" "mit of any doubt. The companies chartered undertake," "in consideration of the privileges granted, to pay to the State" "one-half of one per cent. on each share of capital stock, which" "shall be in lieu of all other taxes. Whether wisely or un-" "wisely, it is clear that the Legislature, by this language," "estopped itself from imposing any other tax for State purposes," "and has agreed that the companies shall be exempt from all" "other taxes. This must necessarily operate as a prohibition" "against the imposition of taxes, either by the State, County or" "City Government."

No further attempt was made to collect "other taxes" after these decisions, until the Bank of Commerce bought a lot and improved it for a place of business, used but one floor, rented the residue of the building, and bought at a trust sale three lots to secure debts due to it. The banking house and lot and the other three lots were assessed for State, County and Municipal taxes.

The bank paid these taxes under protest, and brought suit under the Tennessee Statute to recover the amount. The Chancellor sustained a demurrer to the bill of the bank, and the bank appealed.

In delivering the opinion of the Supreme Court of the State of Tennessee, Mr. Cooper, J., said:

"There is nothing in conflict with this view, as the learned" "counsel of the complainant seem to think, in the decision of the" "Supreme Court of the United States, in Farrington vs. Tennes-" "see, 95 U. S., p. 679. It was there held that the provision in" "the Bank Charter, like the one before us, is a contract," "and will protect the shares of the stockholders from ad-" "ditional taxation. We recognize the controlling authority of" "that Court in such cases, and yield to its decisions. The pro-" "vision in question will, therefore, protect the capital stock and" "the shares of the stockholders from any taxation beyond that" "prescribed in the Charter. It may be conceded, also, as a" "general rule, that taxation of the capital stock of a corporation" "may protect its property in which the capital may be invested," "and that taxation of the property may protect the capital stock." "For the capital stock is usually the representative of the prop-" "erty of the corporation, and the property the representative of" "the capital stock."

Hannibal, Etc., R. Co. vs. Shacklett, 30 Mo., p. 558.

"If, under such circumstances, the stock and the property" "are both taxed, the taxation would be double. But the prop-" "erty may far exceed in value the capital stock, or the corpora-" "tion may become the owner of property outside of the purposes" "of its incorporation. In the latter case, the authorities agree" "that property beyond the legitimate wants of a corporation for" "its corporate purposes is not within an exemption of all prop-" "erty from taxation."

Wilmington R. Co. vs. Reed, 13 Wall., p. 268.
State vs. Newark, 1 Dutch., p. 315.
State vs. Mansfield, 3 Zab., p. 510.
Vermont Central R. Co. vs. Burlington, 28 Verm., p. 193.

"It may be conceded, therefore, in accordance with the" "authorities cited and relied on by the learned counsel of the" "complainant, that a contract by charter for the payment of a" "particular tax, 'which shall be in lieu of all other taxes,' will" "protect the capital stock of the corporation, and all the property" "in which that capital stock may be lawfully invested for the" "purposes of the incorporation, from any additional taxation." "But, as we have seen, an exemption from taxation, and for the" "same reason a limited exemption, will not exempt property" "beyond the legitimate wants of the corporation for the purposes" "of its incorporation. And, clearly, such exemption would not protect property which the corporation is without" "authority to hold. If it were otherwise, the corporation might" "abandon the purposes for which it was created and invest its" "capital in property, and extend the immunity conceded for a" "specific object, to the exemption of that property from the com-" "mon burden of government. The authorities relied on cover" "cases in which property was legally bought and held for cor-" "porate purposes. No case has been produced, and, perhaps," "none can be, where the property was not necessary for the pur-" "poses of the incorporation, and not authorized to be held by the" "corporation."

By a stipulation of counsel, the decree pronounced in this case was treated as a final decree, and the case was not remanded for further proceedings, as appears from the report of it.

To this decree the bank sued out a writ of error to this court. The case was heard at its October term, 1881. Mr. Justice Field delivered the opinion of the court. After having stated the charter provisions in point, and the facts, he said: "In our judgment" "the limited exemption cannot be extended to property used" "beyond the actual wants of the corporation, carrying out the"

"purposes of its creation. As well observed by the Supreme"
"Court of the State, the contract of exemption beyond the"
"extent prescribed, ceased when taxable property was held for"
"any other purpose."

"It is true that the capital stock of a corporation may, in a"
"general sense, be said to be all the property in which the capital"
"is invested, so that an exemption of the capital stock, without"
"other words of limitation, may operate to exempt all the prop-"
"erty of the corporation."

Railroad Cos. vs. Gaines, 97 U. S., p. 697.

"But where the purposes for which a corporation may hold"
"property is specified in connection with the exemption, the lim-"
"itation of taxation designated must be held to apply only to"
"property acquired for such purposes. This we consider to be"
"the general doctrine established by the numerous cases cited"
"by counsel."

The construction of this charter was next before the Supreme Court of Tennessee, at its April term, 1884, in a controversy between the Receiver of the assets of the City of Memphis, claiming of the Union and Planters' Bank municipal taxes due the extinct municipality. In the opinion, Cooke, J., said: "The principal,"
"if not the only, immunity possessed by the Company was the"
"right to pay one-half of one per cent. per annum upon the cap-"
"ital stock subscribed in lieu of all other taxes, and to have im-"
"munity from any other or further taxation upon complying with"
"this provision of the charter. And that this immunity was"
"continued to the Company in its new business by the express"
"terms of the 21st Section of the Act of 1869, also, is too well"
"settled to admit of any doubt. Railroad Co. vs. Hicks, 9"
"Baxt., p. 442; Wilson vs. Gaines, Ib., p. 546; Gaines vs."

"Whitworth, 8 Lea, p. 594. And it has been so in effect de-"
"termined both by this court and the Supreme Court of the"
"United States in regard to the identical charter now under con-"
"sideration."

Next came the case of Tennessee vs. Butler, *in re* the Bank of Commerce. Chief Justice Deadrick, delivering the opinion of the court, said: "The Bank of Commerce cannot claim exemption"
"from taxation of its shares of stock and other property unless"
"it is so exempt by reason of legislative concession to it of such"
"immunity. If organization had taken place under the original"
"charter, and there had been succession of corporators and"
"change of name, it would not have impaired any right under"
"the original charter."

15 Lea, p. 107.

Upon a second appeal of this case it was very much debated, having been argued by counsel at least three times in the Supreme Court before final decision. The object of the bill was to collect taxes claimed to be due the City of Memphis upon the bank building and lot, and upon the capital stock of the bank, said to be $200,000, the taxes claimed as due being $35,000. Mr. Folkes, J., in delivering the opinion of the majority, said: "So that if we"
"find there has been an organization of this corporation, char-"
"tered in 1856; that there has been succession of corporators,"
"with authorized change of name, the right of the present organ-"
"ization to the exemption from all other taxes upon its capital"
"stock and property necessary to the conduct of its business, upon"
"paying one-half of one per cent. upon its capital stock, nothing"
"else appearing, may be considered as not open to debate.'"

In Re, Bank of Commerce, 2, Pickle, supra.

It thus appears that this charter has been judicially construed to mean that the capital of the bank, as the property of the bank,

and any property in which that capital is invested necessary to the use of the bank, are exempt from taxation, as are also the shares of the capital stock in the hands of the shareholders.

The capital stock of defendant is the money paid in for use in banking. An exemption of such capital stock from taxation necessarily is an exemption of the securities into which the money has been converted in the regular course of a banking business; for, in general, an exemption of capital stock without more, may, with great propriety, be considered, under ordinary circumstances, as exempting that which, in the legitimate operations of a corporation, comes to represent the capital.

117 U. S., p. 136.

In the Union Bank vs. The State, 9 Yerger, p. 490, the charter stipulation provided, "that in consideration of the privileges "granted by this charter, the bank agrees to pay the State one-" "half of one per cent. on the amount of capital stock paid in by" "the stockholders other than the State." It was held a further tax on the capital stock was void. Upon the soundest principles of right, the Federal Courts should adopt the construction this charter has received in these long series of decisions.

Ohio Life Ins. & Trust Co. vs. Debolt, 16 How., p. 432.

If its construction was originally doubtful, it has received the same interpretation in these succession of cases, so that its judicial interpretation has become a rule of property, and justice and reason alike require it to be adhered to.

Flash vs. Conn, 109 U. S., p. 378.
Houston vs. New Orleans, 119 U. S., p. 271.

The judicial and contemporaneous construction are in accord. The Session Acts of the General Assembly, which granted

the Charter, evidence its then construction. The Charter is to be found in Chapter 128, of the Acts of 1856, passed on the 29th day of February. It was construed by the General Assembly that granted the Charter in an Act, being Chapter 74, entitled "An Act "to amend the Revenue Laws of this State, and to provide for a" "proper assessment." By the second Section of that Act, it was declared that the following property shall be exempt from taxation: "12. All capital stock or property of such incorporated companies "as are exempt from taxation in their respective charters."

Code of 1858, Par. 13, Sec. 542.

By the same Act, all stocks, as well as all capital lent or deposited, was taxable. Thus the revenue laws remained until the Act of the 1st of March, 1869, the 9th section of which provided "that no tax shall hereafter be assessed upon any bank or bank-" "ing association or any other joint stock company, organized" "under the authority of this State or the United States, but the" "stockholders in such banks, banking association or other corpo-" "ration, shall be assessed and taxed on the market value of their" "shares of stock therein."

Subsequently, on the 29th day of February, 1870, the General Assembly passed an act to sustain the credit of the State, and to amend the Revenue Laws of the State, and for other purposes, and by the first section of that act, among other taxable property, embraced all shares of stock in any bank, institution or company, now or hereafter corporated, by or in pursuance of any law of this State or of any other State. Under this act, the State of Tennessee and the County of Shelby, severally claimed the right to assess and levy taxes upon the shares of stock that were held by the stockholders in the Hernando Insurance Company, the Bank of Commerce, the Bluff City Insurance Company, the Union and Planters Bank, and the Memphis Life and General Insurance Company,

and their contention was sustained by the Supreme Court of Tennessee, in an opiinon delivered by Judge Freeman, in the case reported and cited from 8 Baxter, supra, and denied by this court in Farrington vs. Tennessee, supra.

The General Assembly, at its session in 1887, passed an act known as Chapter 2, entitled "An act to provide more just and" "equitable laws for the assessment and collection of revenue for" "State, county and municipal purposes, and to repeal all laws" "now in force, whereby revenue is collected from the assessment" "of real estate, personal property, privileges and polls."

By the seventh section of that act it was provided that personal property shall be assessed under the following heads: First, the actual stock in each bank or banking, insurance or other joint stock company or corporation invested in business. By the eighth section it was provided that no tax shall hereafter be assessed upon the capital of any bank or banking association, or other joint stock company organized under the authority of this State or of the United States, but the stockholders and bondholders in such bank, banking association or other corporation, shall be assessed and taxed on the market value of their shares of stocks and bonds therein, * * * and all banks or banking associations or other corporations shall, in addition, be liable for taxes on any property, funds or assets, owned by them, not included in the foregoing provision of this section.

The fourteenth section provided that this act shall not be construed, and shall not so operate, as to exonerate or release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation, but it is hereby enacted that in all cases where such stock is exempted such company or corporation shall be assessed in such way as may be lawful, and in all cases

in which, by the legal terms or legal effect of the charter, the shares of stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of stock is fixed and prescribed and declared to be in lieu of all other taxes; taxes for State, county and municipal purposes shall be assessed and levied at a rate uniform with the rate levied upon other taxable property, upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus.

We thus have a meaning given to this charter by the contemporary authority of a legislative act, by a course of judicial decisions and by thirty-three years of legislative acquiescence in the interpretation.

In the case of the *Attorney-General vs. The Bank of Newburn*, 1 *Dev. & Bat., p.* 216, Chief Justice Ruffin, speaking for the court, said: "The natural construction of a charter creating a corpora-" "tion is that all the privileges conferred, all the duties declared," "and all the burdens imposed, relate to it as a whole, and not to" "the individuals composing it." In that case it was enacted that a tax of one per cent. per annum should be levied on all stockholders in each of the banks of Cape Fear and Newburn, except the stockholders of the State of North Carolina, the tax to he paid to the Treasurer of the State by the president and cashier of said banks on or before the 1st of October of each year. In construing the charter the State Treasurer of North Carolina was of opinion that the bank ought to pay on its *capital stock*, and so collected.

An information was filed by the State of North Carolina, contending that the construction put upon the charter of two banks by the Treasurer of the State from the creation of the banks, was

clearly erroneous. The Chief Justice also said: "Besides the" "reasons for our opinion, drawn from the provisions of the Act" "itself, a most forcible one arises out of the contemporaneous" "construction put upon the Act by the stockholders, the fiscal" "agents of the State and the Legislature. Their acts contempo-" "raneously, and continued consistently through the period of" "eighteen years, are such strong proofs of the sense in which the" "Act was understood by those who have passed it as to make" "their construction almost as authoritative as if the words admit" "of no other."

Digesting this case, Mr. Waterman, in his work on Corporations, p. 489, thus states it: "Where a bank charter was ambigu-" "ous, it was held that the contemporaneous construction put" "upon it by the stockholders, by the fiscal agents of the State," "and by the Legislature, commencing with its date, and contin-" "uing for a period of eighteen years thereafter, was such strong" "proof of the sense in which it was nnderstood as to make the" "construction thus adopted authoritative."

Atty.-Genl. vs. Bank of Newbern, 1 Dev. & Bat., p. 216.

Ohio Life Ins. & Trust Co. vs. Debolt, 16 How., p. 434.

But, inasmuch as the above quoted section of the act of 1887 is drawn with great care to assess and levy a tax upon the capital stock of the Bank of Commerce, and all other corporations in like condition with it, it is not improper to consider the clause of the charter under which the exemption is claimed, as though its construction was for the first time to be judicially determined.

The exemption when considered as a case of first impression depends upon the proper construction of the words, "said institution" "shall pay to the State an annual tax of one-half of one per cent."

"on each share of capital stock, which shall be in lieu of all other" taxes?" Is the construction to be limited to an exclusion of all other taxes on the shares of capital stock, or to include, under the universality of the expression the capital of the bank as well?

Mr. Cook, in his treatise on the Law of Stock and Stockholders, says there are two classes of exemptions from taxation which affect the taxation of stock. The first class involves the question whether the exemption of the corporate property and franchise or capital stock from taxation, exempts also the shares of stock from any taxation. The second, whether an exemption of the shares of stock from taxation, exempts the corporate property, franchises and capital stock. That which concerns us is the second class.

As regards it, it is established by the great weight of authority, that their exemption from taxation exempts, also, by implication, the corporate franchises, capital stock and tangible property from any tax.

Scotland County vs. Ry. Co, 65 Mo., p. 123.
The Commissioners vs. R. R. Co., 47 Md., p. 492.
The Bank of Cape Fear vs. Edwards. Supra.
The Mayor vs. R. R., 6 Gill, p. 288.
The Tax Cases, 12 G. & J., p. 117.
Gordon vs. The Mayor, 5 Gill, p. 231.
Cook on Stocks, Sec. 568.

Before the granting of the charter to the Bank of Commerce, this question was before the Supreme Court of Mississippi in O'Donnell vs. Bailey, et al., 22 Miss., p. 386. There, by the charter of the Commercial Bank of Manchester, the right of the State to tax it was limited to one-fourth of one per cent. on each share of stock subscribed, to be paid into the State Treasury. The

controversy grew out of a tax of one-half of one per cent. assessed pursuant to an ordinance of the Town Council of Yazoo City upon the estimated value of its capital stock. The bank refused to pay the tax thus assessed. Its property was thereupon levied on and advertised for sale. To restrain this sale, the bank filed its bill in equity, which was sustained by the Court below, and on an appeal, Chief Justice Smith said: "By the charter, the right of the State" "to tax the bank, which otherwise would have been unrestricted," "is expressly limited to one-fourth of one per cent. on each share" "of stock, and confined to a tax for State purposes, for so we" "must understand the provision which directs that the taxes im-" "posed within that limit shall be paid into the State Treasury." "The Legislature, therefore, had no right to delegate to the" "Town Council of Yazoo City, power of taxation, as claimed in" "reference to this bank. The State could not authorize a mu-" "nicipal corporation to impose a tax which she, herself, would" "have no right to levy. It is laid down by all the authorities" "that the exemption claimed is to be construed with strictness." Thereafter this court affirmed the decree of the Supreme Court of Tennessee, limiting the commutation to the tax that was annually to be paid to the State, and expressed in the contract to be in lieu of all other taxes on property of the bank necessary for its business.

If the provision in the charter provided that a certain rate of taxes should be in lieu of taxes to the Municipality, then there would be great force in the view presented for the State. But here the charter stipulation is that the bank shall pay one-half of one per cent., which shall be in lieu of all other taxes, so that other taxes cannot be imposed or the taxes be subsequently increased.

Leroy vs. Ry., 18 Mich., p. 233.
Bank vs. Knoop, 16 How., p. 369.
Bank vs. Debolt, 18 How., p. 380.

Bank vs. State, 1 Black, p. 244.
Bank vs. Shelly, 1 Black, p. 436.
Gordon vs. Appeal Tax Court, 3 How., p. 342.
Tennessee vs. Whitworth, 117 U. S., supra.
New Orleans vs. Houston, 119 U. S., supra.

The exemption of the shares of stock from taxation upon the payment by the bank of one-half of one per cent. annually on each share includes the capital of the bank, because by the charter exempting the stock from all taxes except the commutation tax, the intention is manifested that the State would forego the right to levy taxes upon the capital of the bank.

State vs. Brannin, 23 N. J., p. 484.
State vs. Bentley, 23 N. J., p. 532.
State vs. Powers, 24 N. J., p. 400.
Ordinary vs. R. R., 40 Ga., p. 646.
New Haven vs. Bank, 31 Conn., p. 106.
Tax Cases, 12 G. & J., p. 117.
Hannibal & St. Jo. R. R. vs. Clackett, 30 Mo., p. 550.
State vs. R. R., 37 Mo., p. 265.
Nichols vs. N. H. & N. Co., 42 Conn., p. 103.
R. R. Co. vs. Allen, 15 Fla., p. 637.

Forgetting altogether that this charter was ever before the Supreme Court of Tennessee, or any court, that a cotemporaneous construction had been put upon it by the Legislature and by the fiscal agents of the State at its very date, and continued for a period of thirty-one years, when read alone in the light of its plain words, the tax now sued for is levied under acts that violate the contract between the State of Tennessee and the bank.

The case of Gordon vs. the Appeal Tax Court, cited by the Supreme Court of the United States as conclusive in favor of the shareholders of the bank in Wicks vs. Tennessee, involved the

judical construction of the eleventh section of chapter 131 of the Session Acts of Maryland of 1821. By this section it was enacted that upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further burden or tax upon them during the continuance of their charters under this act. The question was as to whether or not a tax on the shareholders in one of the banks that accepted and complied with the terms and conditions of the aforementioned charter, was repugnant to the constitutional provision that no State should pass any law impairing the obligation of a contract. Justice Wayne, in pronouncing the opinion of the court, said: "Does it exempt the respective" "capital stock of the banks as an aggregate, and the stockholders" "from being taxed as persons on account of their stock? We" "think it does both. The aggregate could not be taxed without" "its having the same effect upon the parts that a tax upon a part" "would have upon the whole. Besides, the Legislature in pro-" "posing the terms and conditions of the act, used the word" "'banks' with reference to the consent or acceptance of the act" "being given by the stockholders according to the fundamental" "article of their charter. * * * When, then, the Legislature" "says that upon any of the aforesaid banks accepting of and" "complying with the terms and conditions of this act, the faith of" "the State is hereby pledged not to impose any further tax or" "burden upon them during the continuance of their charters" "under this act, the relative is as broad as the antecedent, com-" "prehending all that the charter referred to. It cannot be said," "then, that the stockholders are not exempted by the eleventh" "section of the act of 1821, from being taxed as persons on ac-" "count of their stock in those banks during the continuance of" "their charters under that act."

The question in the State Bank of Ohio vs. Knoop, 16 How.,

supra, involved the constitutionality of an Act of the State of Ohio, passed on the 31st of March, 1851, entitled an Act to tax banks and other stocks the same as property is now taxable by the laws of the State. The bank was, as three-fourths of the banks of the State of Ohio were, organized under the banking Act of 1845, the sixtieth section of which provided that six per cent. of the profits should be set apart semi-annually to the State, and that the sum or amount so set over shall be in lieu of all taxes to which the company or stockholders therin would otherwise be subject.

The subsequent Act of 1851 was held unconstitutional, Chief Justice Taney, who gave a separate opinion, saying: "I think" "that by the sixtieth section of the Act of 1845 the State bound" "itself by contract to levy no higher tax than the one therein" "mentioned upon the banks, or stock in banks, which organized" "under that law, during the continuance of their charters. In" "my judgment the words used are too plain to admit of any" "other construction."

The question next came before the Supreme Court of the United States in the case of

Dodge vs. Wolsely, 18 How., p. 336,

involving the Act of the 13th of April, 1852, imposing a tax upon a bank organized under the Act of the 24th of February, 1845, entitled an Act to incorporate the Bank of the State of Ohio and other banking companies. Mr. Justice Wayne, after stating the clause of the sixtieth section of the Act, said: "The words," "'would otherwise be subject,' related to the legislative power" "to tax, and is a relinquishment of it, binding upon the Legis-" "lature which passed the Act, and upon succeeding Legislatures," "as a contract not to tax a bank during its continuance with" "more than six per cent. upon its semi-annual profits. The" "change of Constitution cannot release a State from contracts"

"made under a Constitution which permitted them to be made."
(See page 361.)

Bank vs. Skelly, 2 Black, p. 448.

In the discussion of the series of cases adjudged by the Supreme Court of the United States in Farrington vs. Tennessee, every member of the court conceded that the charter tax exempted the the bank from taxation. Judge Strong, with whom concurred Justices Field and Clifford, in his dissenting opinion, said: "The" "language of the acts is, the 'institution' shall pay, or the com-" "pany shall pay, an annual tax, which shall be in lieu of all" "other taxes. It was, therefore, the institution or corporation" "the Legislature had in view, alike in imposing the tax, and" "granting the immunity, and not the natural persons who might" "happen to own shares in the corporation. It is true that in" "several of the charters the corporations are required to pay a" "tax on each share of capital stock subscribed, and, in one, upon" "the amount of capital stock paid in. Hence, it has been" "argued, the Legislature had shares in view; and, from this, the" "further inference is sought to be drawn that the purpose was to" "tax alike the corporations and the stockholders, and to exempt" "both from all other taxation. Such a construction is, however," "directly in conflict with the ruling in the Delaware R. R. tax," "*supra*, and with the expressed declaration that the company or" "institution shall pay the tax to the State, which was to be in lieu" "of other taxation. Besides, the reference to each share of cap-" "ital stock subscribed is easily accounted for, without holding" "that the shareholder, as well as the companies, were intended" "to be exempted. The amount of capital stock authorized for" "each company was fixed by its charter and divided into shares." "It was quite possible that the whole stock authorized might not" "be subscribed. In view of this, the companies were required to" "pay a tax, not upon their authorized capital, but to the extent of"

"the shares subscribed. If such was the intent of the Legislature,"
"reference to the shares was necessary, and it raises no implica-"
"tion that the tax imposed was designed to be for the individual"
"interest of the shareholders in the corporations, and that the"
"exemption from further taxation was granted to them."

In New Orleans vs. Houston, 119 U. S., p. 279, Mr. Justice Matthews, of the Lottery exemption, said: "The corporation is"
"exempted by its charter from all other taxes and licenses of"
"every kind whatever, in excess of $40,000 per annum, and yet,"
"by the act No. 77, though the assessment is not to be made"
"upon its capital stock, but upon the shares of shareholders ap-"
"pearing upon its books, nevertheless, the tax so assessed is to"
"be paid by the company, although it is entitled to collect the"
"amount so paid from the shareholders in whose account it is"
"payable, but this payment by the company is to be made irre-"
"spective of any dividends or profits payable to the shareholder,"
"out of which it might be repaid." That it is substantially a tax upon the corporation itself, the learned Justice proceeds to state, giving his reasons.

In the previous case of Tennessee vs. Whitworth, 117 U. S., supra, the Chief Justice, among other things, said: "In corpora-"
"tions four elements of taxable value are sometimes found: 1,"
"franchises; 2, capital stock in the hands of the corporation; 3,"
"corporate property; and, 4, shares of the capital stock in the"
"hands of the individual stockholders. Each of these is, under"
"some circumstances, an appropriate subject of taxation, and it"
"is no doubt within the power of a State, when not restrained by"
"constitutional limitations, to assess taxes upon them in a way"
"to subject the corporation or the stockholders to double taxa-"
"tion. Double taxation is, however, never to be presumed."
"Justice requires that the burden of government shall, as far as"

" practicable, be laid equally on all, and, if property is taxed "
" once in one way, it would ordinarily be wrong to tax it again "
" in another way, when the burden of both taxes falls on the "
" same person. Sometimes tax laws have that effect; but if they "
" do, it is because the Legislature has unmistakably so enacted. "
" All presumptions are against such an imposition."

" This brings us to an examination of the present charter to "
" see what the Legislature has expressed its intention of doing. "
" 'The capital stock of said company' is exempt from taxation. "
" That has been expressly enacted, and the owner or owners of "
" the stock are necessarily relieved from all taxation on this ac- "
" count. The important question is, therefore, who are the "
" owners of the capital stock of this corporation within the mean- "
" ing of the term 'capital stock' as used in this charter, because "
" in construing statutes which are binding on States as contracts, "
" the words employed are, if possible, to be given the same "
" meaning they had in the minds of the parties to the contract "
" when the statute was enacted. In this respect there is no "
" difference between a contract of a State and a contract of a "
" natural person. If the words employed are capable of more "
" than one meaning, that meaning is to be given them which, "
" taking the whole statute together, it is apparent the parties in- "
" tended they should have."

The two cases last above cited, were cases where the intention of the Legislature was gathered from the words employed, taking the entire statute together. In the former case the shares of stock were exempted, because it was manifest that the substance of the Act under review, was the imposition of a tax upon the capital stock of the corporation, in the aggregate, and as its property, though guised under the form of a tax on shares against the share-holders. In the latter case, the exemption was of the capital

stock, which the Supreme Court held to include the exemption of the shares, as it could not have, upon any fair construction of the charter, and all of its clauses, an existence separate and distinct from the property into which the money paid upon the subscriptions had been converted.

In that case the exemption in order to be operative at all, being of the capital stock, should necessarily be construed to be of the shares of the capital stock, while here the words used, when applied to taxes levied against the capital of the bank, are incapable of any other than their obvious meaning, expressed as they are, to cover the legislative intent in the most unmistakable way. If it was necessary to go out of the plain meaning of the words used, to ascertain their intent, it is found in the Session Acts of 1856, and the subsequent Acts, until the Act passed of which we complain.

The distinction between shares of stock and capital stock was well understood in Tennessee when the charter was granted to the Bank of Commerce. It was then as well known as it is now, that the capital stock was the money or property put into a single corporate fund by those who by subscription therefor became members of a corporate body, and that that fund was the property of the aggregate body only, and that on the other hand a share of stock is the right to partake, according to the amount put in the fund, of the surplus profits thereof, and ultimately, on the dissolution of the corporation, to so much of the fund thus created as remain unimpared, and is not liable for the debts of the corporation.

Burrell vs. R. R. Co., 75 N. Y., p. 216.

The revenue laws for the year 1856 are contained in Chapter 74 of the Session Acts of that year. By the first section it was

enacted that a yearly tax of ten cents on the one hundred dollars shall be assessed, among other property, upon all stocks, and that among all exemptions from this taxation, all capital stock or property of all such incorporated companies as are exempt from taxation in their respective charters. This Act continued in force until the Sessions Acts of 1869, when all capital stock was exempted under its eighth section.

During all this while, and, indeed, up to 1887, *except for one year*, the rate of taxation, varying as it did from ten cents on the one hundred dollars, to forty five cents on the one hundred dollars on capital or shares of stock, the capital stock of the Bank of Commerce, not as shares, but as an aggregation of shares paid in as capital, was taxed at an annual stipulated tax of fifty cents, and while the shareholder paid sums varying from ten to forty-five cents on the one hundred dollars upon the value of their shares of stock, the capital stock of the corporation in which these shares of stock were, were exempted from taxation, and each shareholder was entitled to claim one thousand dollars of personal property as exempt from taxation.

The charter of the Bank of Commerce, which provides that "this institution shall pay to the State an annual tax of one-half" "of one per cent. on each share of the capital stock, which shall" "be in lieu of all other taxes," exempts no particular property; the exemption is a personal one by which the bank, for a bonus annually to be paid "in lieu of all other taxes," purchased a privilege, viz.: of employing its capital in banking operations. Therefore, against the bank no "other taxes" can be levied upon its franchise, its capital stock in its hands for banking purposes, its corporate property necessary and legitimately pertaining to its banking operations, and the shares of stock in the hands of its individual stockholders, for the State has thus contracted in lan-

guage giving so clear an expression of an intention, that Chief Justice Nicholson said, "it is too explicit and comprehensive to ad-" "mit of any doubt."

The argument for appellants assumes that the cases in the court prior to 95 U. S., p. 689, are overruled by that case, and that case decides that the exemption is limited to additional taxes on shares of stock; that the subsequent cases in the State Court are erroneously decided; that the construction of the charter of the bank by Judge Field, in 104 U. S., is *dictum*.

If the narrowest possible construction be given to the Farrington case, and that decision is thus limited, it decides that shares of stock are exempt from "other taxes," and while it does not adjudge that the franchise, or capital, is exempt from, or subject to, "other taxes," *arguendo*, it clearly interprets the charter to include them in the exemption.

If the obvious, clear and unambiguous meaning is given the words, "shall be in lieu of all other taxes," then the universality of their thus expressed meaning in the sense they are ordinarily employed, includes every one of the different taxes to which the bank and its shareholders would be subject but for this charter stipulation.

See Worcester's Dic., words "all" and "other."
See Webster's Dic., words "all" and "other."
See Imperial Dic., words "all" and "other."

"All" means "every one of," is used to signify "the whole of," is expressive "of entirety, universality," and "other" is used to express "different taxes from those specified."

It is contended you must not give an obviously plain, ordinary meaning to those words, because when you give the strictest con-

struction to the charter, and you must do so, it is to be interpreted as an exemption from "*all additional taxes*" on shares of stock.

In Farrington's case, Mr. Clifford, J., said: "It may as" "well be said the power is reserved to tax anything else as fur-" "ther to tax the shares. We cannot so hold without interpolating" "into the clause a term which it does not contain. This we may" "not do. Our duty is to enforce the contract as we find it, and" "not make a new one."

The argument used here was pressed in the case of Farrington. There, as here, the court was asked to interpret the charter of this bank to exclude from "other taxes" a particular tax. The argument was answered by the observation, "there is no reservation or discrimination as to any other tax. All are alike included.

The court is asked not only to strain the meaning of the words used to express the intention of the Legislature, but to add by interpolation into the clause, words which it does not contain. The words to be interpolated are "on shares of stock."

Exemptions from taxation are never presumed; the presumption is always the other way, but here the question is not as to the existence or non-existence of any exemption. That is too clear. The questson is, what taxes did the State of Tennessee stipulate that it would forego for one-half of one per cent. on each share of capital stock the bank was annually required to pay? In short, what does the exemption from "all other" taxes include?

It is not to be limited to "all other taxes on shares of stock," because that construction would do manifest violence to every cardinal rule of construction.

It would be construing the charter of this bank so that double

taxation could be imposed, and this, too, in the face of the decision in the State vs. Union Bank, 9 Yerger, which holds that the imposition of a commuted tax of one-half of one per cent. annually on the capital of the corporation, by implication, is a prohibition of the imposition of other taxes on the capital. That was the law in Tennessee in 1856, and has continuously remained till now.

What is to be done with the words, "which shall be in lieu" "of all other taxes?" Add other words to them and imply thereby a limitation upon their ordinary meaning, or construe them as they are generally understood? Certainly not.

In New Jersey vs. Yard, 95 U. S., p. 116, Mr. Miller, J., said: "The language used by the Legislature is inconsistent with" "the right claimed, 'which tax shall be in lieu and satisfaction" "of all other taxation or impositions whatsoever by or under the" "authority of the State.' Is there to be implied, 'except such" "laws as may hereafter be enacted?' Such provision would" "nullify the whole contract. How could the tax be in lieu and" "satisfaction of all other taxation if other taxes might be im-" "posed next day; or how can it be in satisfaction of all taxes" "whatsoever under authority of the State if the State could im-" "mediately impose another and more burdensome tax? We ad-" "mit the force of the doctrine, that when it is asserted that a" "State has bargained away her right of taxation in a given case" "the contract must be clear and cannot be made out by dubious" "implications."

95 U. S., p. 116.

If there could be no implication indulged in by the Yard case, *supra.*, why should there be here? How can the tax be in lieu of all other taxes if any other tax can be imposed on the franchise or capital of the institution, when, for "the commuted tax" the

bank buys of the State the immunities, privileges, powers and rights specified in its charter. The exemption is not of any further tax on shares of stock, but is of all (*i. e.*, every one), other (different, not the same), taxes.

A valid exemption of corporate property has been held to include gross receipts and capital stock—

89 N. C., p. 291.
89 N. C., p. 301.
36 La. Ann., p. 396.

and the latter is exempt in the hands of the shareholders.

A law pledging the faith of the State not to impose any further tax or burden upon banks if they would perform certain conditions, the Supreme Court of the United States ruled was more than an exemption of the franchise and capital of the bank; it was, as well, an exemption of the shares of stock.

Gordon vs. Tax App. Court, 3 How., p. 133.

On the other hand, a valid exemption of corporate property from taxation has been held to exclude all property except such as is necessary for the company's business.

Bank of Commerce vs. Tennessee, 104 U S., p. 493.
IV. A. & E. E. L., p. 272 f., and Desty's Note.

Here there is no implication as to the exemption from all other taxes. The exemption is expressed in clear and unambiguous language. The intention of the Legislature is manifested in apt words The case is not like the case of Gordon vs. Tax Appeal Court. That case turned upon the construction of a Maryland Act, exempting banks, for a bonus paid, from the imposition of any further taxes or burdens. The question was, whether or not, by implication, it was the intention of the Legislature to exempt the

stockholders from taxation as persons, on account of the stock which they owned in the banks.

The Supreme Court held it was, not because it was expressed in words but because, in the light of attending circumstances, such legislative intention was manifested as to give the exemption by implication.

The intention was deduced because the faith of the State was pledged not to impose any other burdens upon the bank, for a bonus which the bank paid. Here the faith of the State is piedged, for the annual bonus which the bank pays to the State, that it will impose no other taxes, the bonus tax being received in lieu of all others.

It is conceded, and always has been, by counsel for the bank that the property of shareholders in their shares, and the property of the bank in its capital, may each be taxed when such is the clear intention of the Legislature, provided they are not exempt from that tax. The contension of the bank was, and is, that the capital of the bank is exempt from taxation by a clear and unambiguous stipulation to that effect, in its charter, thus construed for half a century in Tennessee; so interpreted by this court, and by a series of State Supreme Court decisions. *The force of the decisions cannot be answered*, for they are conclusive adjudications. (1) That an annual commutation tax laid on the capital of a bank, without any words of exemption from other or additional taxes, by implication exempts the capital of a bank from additional taxes. (2) That an annual commutation tax to be paid by the corporation to the State, on shares of stock in lieu of all other taxes, exempts from taxation (1) the capital, (2) the franchises of the corporation, and (3) the shares of stock in the hands of the shareholders.

The immunity from taxation, except the commutation tax, is

annexed to the grant to the corporation, to operate to exempt the corporation from all taxes upon its capital stock and property necessary to the conduct of its business, and from paying the privilege tax to do business; that the universality of the exemption included shares of stock in the hands of the shareholders *non constat;* that it is an exemption from the payment of taxes other than one-half of one per cent. confined to shares of stock. That construction would deprive the corporation itself of the immunities given by its charter and impair the obligation of a contract between it and the State, and extend by construction the immunities of the grant to the members of the corporation.

The learned district judge was of the opinion that the State intended and did, by the words used, include in the exemption the capital stock, as well as the shares of stock, and accordingly he so adjudged.

The manifest correctness of the decision sustaining the demurrer becomes apparent, illumined by the recent judicial decisions of the Supreme Court of Tennessee.

In its April term, 1892, in the cases of Memphis vs. the bank, and insurance companies; and Memphis vs. the Home Insurance Company; Memphis vs. the Phoenix Insurance, Company and Memphis vs. the City Bank, the State Supreme Court speaking by Judge Caldwell, reaffirmed the doctrine so often announced "that exemption from taxation had never been allowed by the courts except upon the clearest grant of organic or statute law" or unless "manifested by words too plain to be mistaken," or "declared in clear and unmistakable language," or to be "shown indubitably to exist."

The existence of such exception must be free from any reasonable doubt.

Having announced the rule of construction Judge Caldwell, speaking for the court in the Union & Planters' Bank case, said "this court has never decided, and in the absence of the ruling of the Supreme Court of the United States in Farrington vs. Tennessee, 95th United States, page 679, would not now decide that the charter gives the owners of the shares of stock any immunity or exemption from taxation on the shares." "The question is now adjudged alone upon the authority of that case, 91st Tennessee, pages 555-6."

The learned court having in that case considered the right of the municipal corporation to recover $1800, as privilege taxes for the years 1889-90-91, claimed for the banking business, speaking by the learned judge, in determining the proposition, said "the language of the charter implies that in consideration of the public good and the payment of the tax therein specified the State will allow the corporation to exercise the franchise as granted without further taxation."

The case of New Orleans City, etc., vs. New Orleans, 143 U. S., p. 192, is not, as we understand it, an authority against this ruling. There the contract afforded no evidence of an intention to exempt the corporation from license or privilege tax. Here the charter tax was imposed primarily as a consideration for the corporation franchises and the right to exercise them; no other reasonable construction can be placed on the words of the charter. The State is bound by its contract, and so likewise is the City of Memphis, which is but an arm or agency of the government; this is true not only as to the privilege taxes, but also in respect to other taxes claimed in this case. All subjects of tax covered by charter tax are exempt from further assessment, whether made in behalf of the State, county or municipality.

Memphis vs. The Bank and Insurance Co's, supra, 556 and 557.

The subject matter of the above suit was to recover from the Union & Planters' Bank $48,576.25 as ad valorem taxes on its capital stock for the years 1887 to 1891 inclusive, and also $1,800 privilege taxes for the years 1889 to 1891 inclusive, or in the alternative to recover from the shareholders the former amount as taxes due on shares of stock.

The charter of the Memphis City Bank, which was construed by this court in Farrington vs. Tennessee, supra, was construed by the State Supreme Court in its last session in April at Jackson. Interpreting the provision "that there shall be levied a State tax" "of one-half of one per cent. upon the amount of capital stock" "actually paid in, to be paid in the same way and at the same" "time as other taxes are by law collected, which shall be in lieu" "of all other taxes and assessments," Mr. Judge Caldwell said: "That the charter tax is laid exclusively upon the capital stock is too manifest to admit of debate, and, to our minds, it is equally clear that the words, 'which shall be in lieu of all other taxes and assessments,' refer alone to the same subject of taxation. But the one object of taxation is mentioned. Hence, it would be illogical to give the exemption greater scope. The exemption contemplated followed, in the legislative mind, as a proper result from the tax imposed. The property protected from further burden is that upon which the specific burden is already imposed. The shares of stock are not liable for the charter tax; they are not embraced in the charter exemption; they are subject to taxation as other non-exempt property of the same kind."

Memphis vs. Memphis City Bank, 91st Tenn., 579.

From these utterances of the Supreme Court of the State of Tennessee, it is obvious that that court understood and now construes the language in charters "the institution shall pay or the company shall pay an annual

tax which shall be in lieu of all other taxes, and "that there shall be levied a State tax of one-half of one per cent. of the amount of capital stock actually paid which shall be in lieu of all other taxes and assessments" to be within the rule of exempting from taxation "the franchises and capital stock" from further taxation by the "clearest grant of statute law, manifested by words too plain to" "be mistaken, declared in clear and unmistakable language and" "shown indubitably to exist." When these charters were before this court in Farrington vs. Tennessee, after quoting the clause in the charter of the Memphis City Bank, then called the Memphis City Fire and General Insurance Company, Mr. Justice Strong said: "I agree with the majority of the court that there is no substantial difference in the extent of the exemption offered in these several charters, though there is some difference in their phraseology," and thereupon proceeded to give his reasons why he thought the judgment of the Supreme Court of the State should be affirmed. That the charter tax of the Memphis City Bank is laid exclusively on capital stock, is in the words of Judge Caldwell "too manifest to admit of debate and that this court decided that the words "which shall be in lieu of all other taxes and assessments" was a grant of an immunity to the shareholders in that corporation from State, county and municipal taxation is also "too manifest to admit of debate." However we view the question, annexed to each share of stock is an immunity from all taxation, and the only tax which the bank is required to pay on its capital stock and franchise is that which is the commutation tax of one-half per cent. annually on each share of stock. It is immaterial whether the capital was paid in before or after the constitution of 1870, as the exemption from taxation is measured by a commutation upon the entire capital stock paid in whether that capital was original or increased capital stock of the bank. The commutation tax is annexed and fixed and to be colleeted. The exemption from taxation extends to all shares of stock permitted under the charter

whether issued upon the organization of the corporation or subsequently thereto.

The State vs. the N. & W. R. R., 30th Conn., 290.

Union & Planters' Bank case, 13th Lea, Tenn., 400.

The right to issue stock under the charter of the Bank of Commerce is one of the corporate franchises annexed and not a mere gratuity, which can be taken away or altered at the pleasure of the Legislature. It is one of the fundamental rights of the corporation and its members.

Railway Co. vs. Allerton, 18 Wallace, 233-6.

The State of Tennessee and the county of Shelby, joining for the convenience of litigation, severally assert claims to exact the payment of taxes upon the capital stock of the Bank of Commerce, subscribed and paid in after the constitution of 1870, upon the theory that as to that part of the capital acquired after the constitution of 1870, it became taxable under the provision that all property should be subject to taxation.

It will serve no useful purpose to elaborate in argument this proposition. The corporation had the power to issue the stock, annexed as a franchise to its charter. It did so, and in pursuance of that power received stock subscriptions as a part of the capital which constituted the subscribers members of the corporation, entitling them to the rights of shareholders.

One of these rights, also annxed to the grant, was the immunity from all taxation upon the payment by the bank of one-half of one per cent. annually to the State on each share of this capital stock in lieu of all other taxation.

The right to issue the shares of stock is too clearly given by the charter to be the subject of debate.

The fourth section of the charter provides "it (the bank)" "may receive on deposit any and all sums not less than one dollar" "per week offered as stock deposits, and infants and *femes covert*" "*may* deposit therein and control the deposit so made, which" "shall be for their own separate use, free from other contracts or" "contract whatever, and when such deposits *shall* amount to" "fifty dollars it may, at the option of the depositor, become" "stock in the institution. It *may* receive other general or special" "deposits and allow such interest thereon as *may* be agreed upon," "not exceeding that allowed by law, and twice per year declare" "and pay to stockholders a dividend of profits. But said insti-" "tution is hereby expressly prohibited from issuing notes, certifi-" "cates, or other paper for the purpose of being used, or which" "*shall* have a tendency to pass and be used as circulating" "medium."

The State and county do not question the power of the corporation to increase its capital. The contention is that the increase after the constitution of 1870 is subject to a different and an additional tax than the one to be annually paid to the State of one-half of one per cent. But an irregular subscription, offered as such, or stock deposits, would not affect the validity of the obligations assumed by the bank to the persons who paid in the amounts after the constitution of 1870 to the capital of the corporation. Upon the principle of law that having the power to receive deposits of money as stock subscriptions, a defective execution of the power, either by the subscribers in making their subscription, or by the corporation in the irregularity of their receipt, would not affect the validity of the subscriptions or

the liabilities growing out of the relationship of the subscribers to the corporation.

Ralls County Court vs. United States, 105 U. S., 733.
County of Daviess vs. Huidekooper, 98 U. S., 98.
Supervisors vs. Schenek, 5 Wall., 772.
County of Scotland vs. Thomas, 94 U. S., 682.
Marsh vs. Fulton Co., 10 Wall., 676.
Loan Association vs. Topeka, 20 Wall., 655.
Thompson vs. Perrins, 103 U. S., 806.
Harshman vs. Bates Co., 92 U. S., 569.
Lewis vs. Shreveport, 108 U. S., 282.
Ottawa vs. Carey, 108 U. S., 110.
Norton vs. Shelby Co., 118 U. S., 433.

Since the preparation of the foregoing argument the brief for the appellants, kindly furnished to the writer, indicates that their learned counsel "submit, that under the terms of this charter, the tax is plainly on the capital stock; that the words 'which shall be in lieu of all other taxes,' mean in lieu of all other taxes on the capital stock, and that this meaning is unmistakably evident from the fact that the State reserved to itself a prior lien for taxes on the shares, the institution being required to pay one-half of one per cent. annually on the capital stock."

It is quite a sufficient answer to this contention to interpose the conclusive authority of the decision in this Court in the case of

Tennessee vs. Wicks, supra.

It was argued in 1877 and by one of the learned counsel for the appellants, for the State of Tennessee. He contended then that the construction plainly and manifestly of this charter was the one he now contends for. His view this court declined to take.

It is next argued, that, since the constitution of 1870, which took effect on the 1st day of May of that year, either the power to tax the shares of stock issued subsequent thereto exists, or to tax the capital of the bank, paid in, by the subscribers thereafter. Counsel frankly concede that they have found no direct authority on this proposition, and therefore submit it upon such "general and analogous principles" as they deem material.

The question stated by them, "in its simplest form," is whether the "charter power to increase the capital from time to time, confers upon the corporation an unlimited and unrepealable charter, and contract right to withdraw property from the domain of the taxing power of and witnin the field of its charter, exemption without limit, and from time to time, as it may seem proper."

As thus stated its foundation is in the ingenius mind of counsel. The charter of the Bank of Commerce was granted by an Act of the General Assembly of the State of Tennessee, being Chapter 128 of the Session Acts of 1856. By the 7th section its duration was limited to fifty years. (Record, page 8.) It has required a period of thirty-seven years to attain a capital of a million dollars, notwithstanding, to promote and encourage savings; there was annexed to the grant the most valuable franchise of the corporation—the privilege to "receive on deposit any and all sums not less than one dollar per week, offered as stock deposits," * * * "and when such deposits shall amount to Fifty Dollars, it may (might), at the option of the depositor, become stock in the institution."

The policy of the State of Tennessee, prior to an era of repudiation (disastrous to her people), was to encourage and promote public corporations and quasi public corporations. Banks of issue, banks of deposit, loan and discount, and savings, were encouraged. The Supreme Court of the State in the case of

State vs. Union Bank, supra,

decided 57 years ago, in an opinion, of which this court said, "it was marked by eminent judicial ability and careful thought," maintained the inviolability of the public faith.

Mr. Turley, one of the most learned and scholarly of Tennessee's great jurists of the past, expressed the views of the court and the policy of the State. He said:

"Then, when an institution contracts with the State for the right of doing these things, and pays therefor a valuable consideration, does it not necessarily follow that it has contracted and paid for the use of those means without which the right would be nugatory? The argument is: 'You have paid for the privilege of banking, and you cannot be taxed for that, but you have not paid for the privilege of using your money for the purpose, and, therefore, you shall not do so without you pay a new consideration.' This is something like the reasoning of the learned judge to Shylock: "You have contracted for your pound of flesh, but see you take no blood." It surely cannot be necessary to enter into an argument to prove that, if a privilege be purchased, everything absolutely necessary to its enjoyment is also purchased. This is a principle of such every-day practice, and [497] so universally admitted, that argument upon it would be a waste of time."

Four years after the creation of the Bank of Commerce, in Williams against the Union Bank, Judge Green said, "a bank is created upon public considerations, to subserve public ends, and not for private purposes only."

2 Hum., 339.

The charter of the Bank of Commerce is not unlimited and irrepealable. It is an irrepealable charter for fifty years, with a contract right to receive stock deposits, which does not withdraw property from the domain of the taxing power. It brings property under the operation of a tax, which otherwise would not be subject thereto.

It is true, that the charter in terms, does not limit the amount of deposits which may be offered as stock deposits. The charter does not limit the amount which the bank might pay to "purchase and hold a lot of ground for the use of the institution as a place of business." The same principle applies to the amount of capital, as to the amount paid for a lot of ground, "the limitation being where necessity ends, and mere convenience begins."

Bank vs. Tennessee, 104 U. S., 496.

Therefore, if in the guise of stock deposits, money should be withdrawn from taxation and lodged with the bank, undoubtedly it would be subject to taxation, precisely as real property, purchased and paid for out of the capital of the bank if not used, bona fide, as a place of business.

The argument is without substance, founded in fancy, and on an ideal condition, conceived theoretically.

It is suggested next, this court should affirm that the State of Tennessee and the county of Shelby have the power to tax this increased stock, *either as the capital of the Bank, or as shares belonging to the shareholders;* because (1), the provision by which such capital may be acquired, and shares owned, is executory; (2), it is extremely doubtful whether the Legislature could have granted an immunity from taxation to an unlimited amount of banking capital, and (3), the privilege annexed to the grant providing for an increase of the capital stock from time to time, and the manner thereof, in that particular, is not a contract between the State and the corporators.

Before the discussion of these propositions, it is to be observed, that the new constitution of Tennessee ordained "that all" "property, real, personal or mixed, shall be taxed, but the Legis-" "lature may exempt such as shall be held by the State, by coun-" "ties, cities or towns, and exclusively used for public or corpora-"

"tion purposes, and such as may be held and used for purposes"
"purely religious, charitable, scientific, literary or educational,"
"and shall exempt One Thousand Dollars' worth of personal"
"property in the hands of each taxpayer, and the direct produc-"
"tion of the soil in the hands of the producer and his immediate"
"vendee."

This provision is mandatory to exempt One Thousand Dollars of personal property belonging to each and every one of the shareholders in the Bank of Commerce.

Again, it never has been the policy of Tennessee to tax the shares of stock in the hands of shareholders, and the capital of the corporation both.

1. But passing from these observations to the first proposition, that as to an executory contract, it is withdrawable at the pleasure of the State, it is answered, by the decisions of this Court, without shadow of turning, and of the Supreme Court of Tennessee. The leading case is Fletcher against Peck. There the question was decided by this Court in an opinion delivered by Chief Justice Marshall, who said: "The constitution of the United States declares that no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. Does the case now under consideration come within this prohibitory section of the constitution? In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract? A contract is a compact between two or more parties, and is either executory or executed An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers

was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general word contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected. If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

"Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a de-

termination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviousiy founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State."

2. The second proposition may be passed over, in as much as counsel evidently do not seriously rely on it, and it is not well founded in fact, and is necessarily embraced in the third proposition, that the charter providing for an increase of the capital stock, is not in that particular, a contract between the State and the corporators. If this be so it did not require a constitutional ordinance to enable the State to tax the shares of stock, as counsel well observe on their brief.

3. That the last point may be tested, the charter may be analyzed, to see what is granted thereby. The Bank of Commerce was, and has been an organized and de jure corporation, from and after the date of the grant of the franchise to organize it, continuously. This question was conclusively determined in the Supreme Court of Tennessee in

State vs. Butler, 2 Pickle, 614. Record, p. 1.

The grant is an executed contract, and the question is, is the privilege to receive money offered as stock deposits to be, at the option of the depositor, converted into stock, and thus made a part of the capital of a bank of discount and deposit with savings bank adjunct, a provision expressive of a provision of general law, and not of contract? The distinction is whether the charter was, as to this particular provision, a mere license, or a grant of a corporate franchise or privilege.

Every valuable privilege given under the charter of a private

corporation, and which conduces to its acceptance, and an organization under it, is a contract.

Ohio vs. Knoop, 16 How., 369.
N. O. Water Works vs. Rivers, 115 U. S., 674.

The grant of an immunity from all other taxes except a commutation tax, is a contract.

N. W. University vs. People, 99 U. S. 309.
Asylum vs. New Orleans, 105 U. S., 368.

A grant of a franchise is not in point of principle distinguishable from a grant of real estate.

Dartmouth College Case, 4 Wheaton, 518.

A tax to be paid by the Bank of Commerce under the Act of the General Assembly of the State of Tennessee, being Chapter 128 of the Session Acts of 1856, is a legislative contract equally operative upon the State, and upon the bank and the stockholders of the bank, until the expiration of the charter of the bank, on the 28th day of February, 1906. From the obligations of that contract, a change of constitution cannot release the State of Tennessee.

Dodge vs. Wolsley, 18 How., 360-361.

The charter embodied three distinct contracts, (1) a contract between the State and the incorporators in the grant of a franchise to organize a corporation; (2) the contract with the incorporation when organized, and its shareholders, and (3) a contract between the corporation, its members, and third parties.

The right to receive the several sums of money offered as stock deposits, and to issue shares of stock to evidence the holdings of the shareholders making the deposits, is a corporate franchise.

Reese vs. Bank of Montgomery, 31 Penn. St., 78.

The question has been in many varied forms presented for the

consideration and judicial decision of the Supreme Court of the State of Tennessee. It was argued in the case of the Union & Planters' Bank, reported in 13 Lea, 401, that an immunity from taxation conceded in the 10th section of the charter of that Bank, "that said company shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock subscribed, which shall be in lieu of all other taxes," was limited to the stock subscribed to the original capital stock of the company, fixed by the 2d section of its charter at $300,000, and could not, by construction, be extended so as to apply to the increase, authorized by an amendment to the charter.

Considering that contention, the Supreme Court of the State of Tennessee, speaking by Mr. Cooke, judge, said: "We are unable to yield assent to this proposition. In the cases above referred to, in which this same charter has been construed, no such question was raised or insisted upon, but the immunities of the charter excepting the company from any other or further taxation except one half of one per cent. on each share of its capital stock subscribed, was taken and held to apply to the entire capital stock then subscribed, and which was stated to be $675,000, as well as that which was subscribed after, as before the amendment of 1869."

No question was made as to whether the shares of stock owned by Farrington were subscribed before or after the said amendment to the charter, or whether they were of the original or increased capital stock of said corporation, in Farrington vs. Tennessee, supra.

By the 21st section of an act passed the 12th day of February, 1869, being an act entitled an Act to incorporate the Raleigh Mineral Springs Hotel, and for other purposes, the Union and Planters' Bank of Memphis was created out of the DeSoto Insurance & Trust Company, with the privilege of increasing the capital stock to a sum not exceeding a million dollars, retaining all their pres-

ent rights, privileges and immunities, excepting only that of insurance, and in addition, vested with all the powers of an ordinary bank of deposit and discount. When the stock was subscribed, by which the capital was increased from $300,000 to $675,000, does not appear in any of the reported cases involving the construction of this charter growing out of the persistent efforts made by back tax collectors to collect additional taxes other than the commutation tax paid to the State. This charter tax was imposed primarily as a consideration for the corporate franchises and the right to exercise them.

Union & Planters Bank Case, 91 Tenn., 556.

The language of the charter of the Bank of Commerce implies that in consideration of the public good, and the payment of the tax therein specified, the State will allow the bank to exercise the franchises granted, without further taxation. One of these franchises was the privilege of buying a lot upon which was a house, or upon which to erect a house, to be used as a place of business by the corporation. Another was, to receive sums of money offered as stock deposits, and thereby, when the option of converting them into stock in the institution was exercised by the depositor, increase the capital.

State vs. Boston C. & M. R. R., 25 Vt., 442.

That these were vested rights under the charter, not to be affected by the constitution of 1870, in the language of the Supreme Court of the State of Tennessee, "is perfectly plain."

State vs. Butler, 13 Lea, 408.

In the last cited case, it appeared that the Union & Planters' Bank was the owner of a banking house in the city of Memphis, purchased with its capital stock, which is exclusively used as a banking house. The property was assessed for the municipal taxes of 1874 to 1878, inclusive. The question was, whether the exemption was good under the 10th section of the charter of incorporation.

The bank having paid the one-half of one per cent. to the Comptroller of Tennessee, claimed exemption from all other taxes. A majority of the members of the Supreme Court of Tennessee held that the immunity from all other, except the commutation tax, covered the real property, and that it was exempt from municipal taxes. Not a word was said as to whether the increase of the capital stock was after or before the constitution of 1870, or whether the real estate was purchased afterward or before. It sufficiently appears, however, that it was purchased afterward, because the taxes were claimed for subsequent years.

In the case of the Bank of Commerce against McGowan, it appeared that the Bank of Commerce had bought with a part of its capital stock, and owned a lot in the City of Memphis, which, with the improvements thereon, it purchased as a place of business; used the first floor for that purpose, and renting the cellar and the second and third story to other parties. The purchase was made previous to 1879, and certainly after the 1st of May, 1870. The question was whether or not the lot and improvements thereon, were in whole or in part, subject to be taxed by the State, County and City of Memphis. The taxes were paid under protest, and the bank sued under the statute to recover them.

Neither in this court nor in the Supreme Court of Tennessee, was any observation made as to the right of taxation being dependent upon whether or not there was an increase of the capital stock after the constituion of 1870, and the purchase therewith of the lot and the improvements thereon. The right to so purchase the real estate was a franchise or privilege. It was executory until the purchase was made. In principle, there can be no distinction between the right to purchase real estate for use as a banking-house, and the right to receive money as stock deposits to be converted into capital, except in mere degree the latter privilege being infinitely more valuable than the former.

It is said the right to increase the capital stock conveyed by the charter afforded the right, so long as the State saw fit, to put no limit upon the amount, to increase the capital stock without limit. It is argued that from these premises, without regard to the constitution of 1870, the State could, by legislative act, have put an end at any time to the further increase of the capital stock; and the evident conclusion from the argument is that the power to increase, and the manner thereof, are executory non-contractual agreements.

This proposition concedes that so long as the State saw fit to put no limit upon the amount, the charter afforded the right to increase the capital stock without limit. For more than thirty-six years the fiscal agents of the State of Tennessee, the president, directors and shareholders in the Bank of Commerce have construed the charter of the bank to authorize an increase of capital stock, in the manner pointed out by the organic law of its creation; the former have accepted, and the latter have made, payments of the commutation tax thereon of one-half of one per cent. The claim of immunity from taxation has been predicated of payment annually to the State of this one-half of one per cent., and for the privilege of exercising the franchises, by the charter vested in the corporation. If the Legislature had said the bank should have the power to increase its capital stock to a fixed amount, either in the act creating the corporation, or in an act passed prior to the adoption of the constitution of 1870, amending the charter of incorporation, that such right would be an irrevocable contract right, is too plain, in the light of the authorities, to debate.

The right to increase, *ad libitum*, and without limit, is precisely the same privilege as the right to increase to a fixed amount. But, however this may be, let us see what was the policy of the State of Tennessee, and how it was manifested. On the 6th day of February, 1860, the Legislature of the

State of Tennessee enacted a law entitled "An Act to reform and regulate the business of banking in Tennessee." The first section of that act provided that it should be applicable to every bank then incorporated, or thereafter to be incorporated in the State. By the 4th section it was enacted that the capital stock of no bank in this State shall exceed $3,000,000, nor shall any bank commence business with less paid in capital stock than $300,000; provided, that existing banks which may have more than $3,000,000 capital stock, or less paid in capital stock than $300,000, shall not be restricted to $3,000,000 capital stock, or compelled to increase their capital stock to $300,000.

This act was passed at the same session of the General Assembly of the State of Tennessee, in which the act was passed authorizing the removal of the Chattanooga Savings Institution from Chattanooga, Tennessee, to Memphis. It manifests the policy of the State of Tennessee prior to the constitution of 1870, was to fix a maximum of $3,000,000 to the capital stock of any bank, and $300,000 as a minimum, and so far as that could be done by the act in question, it was done. Whether the act had any effect upon the charter of the Bank of Commerce, it is not material to consider. If it operated as an amendment to it, the capital of the bank is yet within the limit fixed by the act.

After the constitution of 1870 by the general incorporation law, being the Session Act of 1875, Chapter 142, Section 17, the form of a charter for a savings bank and bank of discount was provided, and it was further provided, "when any deposit shall amount to fifty dollars, it may, at the option of the depositor, become stock in said institution."

It will thus be seen that the State has fixed a limit upon the amount of capital in the banks organized prior to 1860, and subsequently thereto, so far as it could by legislative enactment.

The Bank of Commerce was given the right, under its charter, to increase its capital stock, and, in as much as the State did not see fit to put a limit upon the amount in the charter, and the capital has not been increased to the limit fixed by the act of 1860, it would seem to be an irrevocable contract right, within the charter and within the act of 1860, which cannot be impaired by the Session Acts quoted in the appendix.

By the Charter of the Bank of Commerce, the Legislature of the State of Tennessee, for a bonus annually to be paid to the State, granted other privileges to be enjoyed in the future by the corporation and its members. Upon the faith of the grant of these privileges and franchises, the corporation was organized, and under its powers has exercised the privileges annexed to the grant. An alteration in the company's charter, either by an act of the General Assembly of that State, or by the adoption of a new constitution for it, cannot take away any one of these rights, privileges or immunities, without being repugnant to that provision of the constitution of the United States, which ordains that no State shall pass any law impairing obligational contracts. The right to the privileges to be enjoyed in the future, is protected as fully as is the benefit already derived from having enjoyed the privileges.

It is conceded by the brief of counsel, that the requisite jurisdictional amount is not found in the controversy between either the State of Tennessee on the one hand and John T. Fargason on the other, or the controversy between the County of Shelby on the one hand and that defendant. The case is therefore within the rule of Walton vs. Northeastern Railroad, *supra*, so far as the defendant Fargason is concerned.

But it is suggested the bill is maintainable, as it appears the capital of the bank is one million dollars, and its executive officer refuses to disclose the names of its stockholders, because of an

alleged liability for the taxes due from shareholders, and because it is claimed to be apparent from the bill that the amount due from the defendant Fargason for the taxes of all the years embraced in the bill would exceed the jurisdictional amount, and the court will presume that the amounts involved as against the shareholders are sufficient.

We controvert each of the positions assumed by counsel. The bill does not allege a corporate liability for taxes due by shareholders. The argument concedes that the capital of the bank is the subject matter of the commutation tax in clear, distinct and unmistakable language.

Brief of Counsel, pp. 6 and 7.

One of the incidental theories of the bill is that the complainants are entitled to assess the shares of stock, and to this end that they are entitled to a discovery of the holders of them, that they may by an amendment and supplement be brought before the Court for the purpose of enforcing and collecting the taxes due thereon.

Record, page 5.

It may be conceded that if the bill had alleged that the several amounts due from such shareholders in the aggregate for taxes exceeded the value or sum of $2,000, exclusive of interest and costs, either to the State of Tennessee or County of Shelby, then the matter in dispute as between them and the complainants, would be sufficient to give the Court jurisdiction of the suit in equity if it was maintainable for discovery. The bill makes no such averment. We proceed to the consideration of the question whether or not it is apparent from the entire bill the jurisdictional amount exists requisite to give this court cognizance of the controversies between the complainants and John T. Fargason.

The bill avers that the shares of stock in the Bank of Commerce were assessed in form following, to-wit: "For the year"

"1888, thus: Bank of Commerce, unknown owners of shares of"
"stock, 6,000 shares; valuation, $399,000. For the year 1889,"
"thus: Unknown owners of 6,000 shares of stock of Bank of"
"Commerce; valuation, $530,000."

The bill then proceeds in apt language to state the several amounts due each of the complainants upon the theory that the shares of stock in the defendant bank are subject to taxation and taxed because of the failure of the bank to retain dividends, and proceeds: "Complainants are not informed who are the owners of said shares of stock. They are informed that it is claimed in their behalf by the officers of the bank representing them that the shares of stock are not taxable, and that even if taxable, the assessment is void for indefiniteness and uncertainty."

The Supreme Court of Tennessee in the case of these two complainants against the Phœnix Insurance Company, MSS., Jackson, 1884, ruled that an assessment made, as the assessments above, *was void "for uncertainty and indefiniteness."* So that there is no theory which makes it apparent from the entire bill that the amount claimed of the defendant Fargason is the amount requisite to give this court jurisdiction of the suit against him. The specific allegation in the bill setting forth the controversy between the complainants and Fargason is as follows: "Complainants further aver and charge that the defendant, John T. Fargason, on the 10th day of January, 1888, was, and continuously since that time has been, the owner of 1500 or more shares of the defendant company, and that, as hereinbefore stated, the total stock thereof for the year 1888 was assessed for $399,000, and for the year 1889 at $530,000; that the assessment of each share thereof was therefore $66.50 for the year 1888, and $88.33 for the year 1889 That if it be held that the said shares are taxable and taxed, the tax due thereon to the State for the year 1888 is the sum of $299.25, and for the year 1889 the sum of

$397.50; and to the complainant County the sum of $678.30 for the year 1888, and $698.25 for the year 1889. Said defendant, therefore, if it be held that the said shares are taxable and taxed, is personally indebted to the complainants, respectively, in the sums aforesaid," etc.

Upon the face of the record the Circuit Court of the United States was without jurisdiction of the controversy between complainants and the defendant Fargason.

Northern Pacific Railroad Co. vs. Walker, 148 U. S., 392.

It is said, however this may be, that this court will presume that the amounts involved as against the shareholders are sufficient to aggregate $2,000, exclusive of interest and costs. In its literalism the point has no foundation, because, upon the general scope of the bill, the suit is to determine the true and proper construction of the charter of incorporation; that the constitutionality of an act be tested. All the controversies are incidental to this, because the bill claims that either the capital of the bank, or the shares of stock in the bank, are subject to taxation, and not that both are. Complainants expressly state in their bill they do not claim that both the shares of stock in the hands of the shareholders and the capital stock in the hands of the corporation were undertaken to be taxed by the Legislature of the State; but they claim that under the general provisions of the Revenue Laws shares of stock are subject to taxation, and the capital of the bank is not. The contention is that under Section 14 of the act of 1887, the capital stock in the hands of a corporation is taxable, if by the charter provision the shares of stock were not subject to taxation. The bill, however, does not aver the distinct property that is subject to the tax, and is manifestly in the nature of a fishing bill to get a jurisdictional construction of the revenue laws of Tennessee. The incidental object

is to collect by a re-assessment, or upon an old assessment, either the taxes upon capital, in the event capital shall be held as not within the universality of the immunity from taxation contained in the charter, or from the shareholders, in the event the shares of stock are held to be without the immunity, and if both are, then to recover taxes upon the capital of the bank, or upon the shares of the shareholders, paid in and subscribed as stock deposits after May, 1870. How the court is to presume from this contention upon the general scope of the bill that the amounts involved as against the shareholders are sufficient to give the Circuit Court of the United States for the Western Division of the Western District of Tennessee jurisdiction, we confess we are unable to conjecture upon any theory founded upon the allegations of the bill. But, in as much as the argument invites a consideration of the scope of the bill, it may not be out of place to make some observations on the 14th section of the Revenue Laws of the State, being passed at the session of the General Assembly in 1887, and subsequently thereafter at each biennial session re-enacted. The section is to be found in full in the appendix. Under it, it is claimed the shares of stock in this bank are subject to taxation. The section provides that the act is not to be construed and not to operate to exonerate or release from taxation any corporation whose charter exempts stock and shares thereon from taxation. Proceeding, the General Assembly enacts, "that in all cases where such stock is exempted, such company or corporation shall be assessed in such way as shall be lawful, and in all cases where, by the terms or legal effect of the charter, the shares of stock in any corporation are wholly or partially exempted from taxation, or in which the rate of taxation on the shares of stock is fixed and prescribed and declared to be in lieu of all other taxes for State, county and municipal purposes, shall be assessed and levied at a rate uniform with the rate levied upon other taxable property upon the capital of said corporation."

If the contention of the counsel was in this court as it was in the court below, that the subject matter of the commutation tax was fixed on shares of stock, and the words, "in lieu of all other taxes," meant all other taxes on shares of stock, the 14th section of the Revenue Laws would apply; but it is conceded in argument that the subject matter of the commutation tax is the capital of the bank, and it is argued that the sentence is an elliptical one, and the ellipsis to be supplied is, "in lieu of all other taxes on the capital of the bank." This being so, concededly it necessarily follows that inasmuch as the stock is not exempt by the terms or legal effect of the charter, or partially exempt, or a rate of taxation is fixed and prescribed thereon and declared to be in lieu of all other taxes, the section has no application.

Undoubtedly the section was drawn to meet this case, and no doubt after great thought, but it wholly fails to do so if the plain and obvious meaning be given to the exemption about which adversary counsel think there can be no sort of doubt. According to the position of learned counsel, the capital of the bank has a commutation tax fixed on it, expressed to be in lieu of all other taxes. Therefore, no tax is assessed by the 8th section of the Revenue Laws upon the capital of this bank. The taxes are exclusively laid on the shares of stock in the bank and must be against the shareholders. Of course we combat any such theory. Our view is that it is wholly immaterial whether the commutation tax annually to be paid by the bank is fixed upon the capital of the bank paid in or subscribed to be paid in, or upon the capital stock of the bank, so long as that commutation tax "is in lieu," all other taxes are within its universality. Tax on the franchises, tax on the capital, or tax upon the shares in the hands of the shareholders, all alike are included and all alike are within the exemption. But the scope of the bill indicates that the court is without jurisdiction to reach Shareholder Fargason. The bill is a proceeding in equity, where two complainants are joined for the

convenience of litigation to enforce the lien claimed therein against the defendant bank because of an alleged indebtedness due by it. For the statute under which the lien is claimed, illustrated with argument in support of it, has no application to the case stated in the bill against the corporation. The demurrer does not admit either proposition of law is well founded, stated in the alternative. The jurisdiction of the court, then, rests only and wholly upon whether or not the bill is good as a bill for discovery, and notwithstanding the Supreme Court of Tennessee so held in the case of these complainants against the Home Insurance Company, we will undertake in the light of the authorities to controvert that decision.

"*It is true that neither the constitution of* 1870, *nor any legislative act of the State, undertook in terms to repeal or annul the charter exemption of the increased capital stock,*" *and that it is immaterial whether the constitution, in express terms or in legal effect, attempted to annul the exemption clause of the charter.* But the proposition deduced by counsel from the constitutional provision and the legislative acts referred to by them as "clear beyond question that the shares of stock in the defendant bank are primarily taxed by the State, and if the shares be exempt the capital stock is taxed," we controvert.

Counsel states on their brief that since the constitution of 1870, an exemption from taxation could not be granted like that possessed by the Bank of Commerce, either by the grant of a franchise to organize a corporation with special privileges, or by the revivor of an extinguished corporation. The proposition as stated is sound. From it, necessarily it does not follow, that the constitution of 1870 is self-executing, even to the extent that the State has the power to annul the charters of unorganized corporations. The general rule is, without the reserve power to amend or repeal existing grants, special or exclusive privileges, to become vested, upon the organization of a corporation, are not

divested unless declared void in the organic law. The constitution of Tennessee does not so declare.

Atlanta vs. Gate City Gaslight Co., 71 Ga., 106.

There is here no attempt to revive an exemption, either by an original act of incorporation or otherwise.

The right to receive sums of money as stock deposits is a special privilege when granted to a corporation, consequently a franchise. The State of Tennessee has exacted an annual commutation tax upon capital as increased by these deposits. Thus, it has exacted payment for the benefit derived by the exercise of the franchise from time to time. Although the right is not unconditionally given to convert such deposits into capital to the bank, the right to receive such deposits is unconditionally given it. This right is a franchise, but after conversion into capital, it is a vested property right that survives even after a dissolution of the corporation.

International & Great Northern Ry. Co. vs. The State, 75 Tex., 356.
Given vs. Wright, 117 U. S., 656.

Passing to the consideration of whether the legislation of the State is sufficient to impose the tax, at the threshold, it is pertinent to inquire into the subject matter of this litigation. It is, for all purposes, what the appellants have declared it to be, in their bill of complaint, and we submit they have declared it to be a proceeding for the determination of whether "the tax is validly laid on the shares of stock in the hands of the stockholders, or on the capital stock in the hands of the corporation."

Record, page 5.

It is assumed on the brief of counsel that the point made that this court is without jurisdiction to determine whether or not John T. Fargason, one of the defendants, is liable for taxes alleged to be

due by him as a shareholder in the Bank of Commerce. It is not tenable, because the 12th section of the act (Record, pp. 2 and 3), provides the bank itself is liable for the taxes laid on the shares, for its failure out of dividends declared, to retain and pay the taxes conformably to that section.

It is further stated in support of the jurisdiction, that the bill shows on its face the amounts due the State for the years 1888–9 from the shareholders, on the theory that the shares are subject to taxation, are $2,787.80, and to the county and to the State $6,423.20. It may be conceded, in order to establish the liability of the bank, that it is necessary to show the liability of the shareholders in the bank, and the breach of duty on the part of the bank, to withhold dividends necessary to pay any and all taxes assessed in pursuance of the act under which taxes are claimed to be collectable, or its shareholders, one or the other.

But the question is, does this court presume that the jurisdictional amount is involved as against shareholders, in order to retain this case for determination? The jurisdiction of the Circuit Court of the United States for the Western Division of the Western District of Tennessee is limited to suits at law or in equity, of a civil nature, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the constitutional laws of the United States, or treaties made, or which shall be made under their authority. Act of the 3d of March, 1887, Section 1, as corrected by the act of the 13th of August, 1888.

There is no room for this court to presume it has jurisdiction because the matter in dispute exceeds $2,000, exclusive of interest and costs, because there are no apt facts alleged, showing the the amount claimed. The case, we think, is within the principle of

The matter in dispute between the Bank of Commerce on the one side, and the State of Tennessee and County of Shelby on the other, is not, in any view of this case, the several amounts claimed as due for taxes from the shareholders of the complainant, respectively, but the liability of the bank, because of the failure of its cashier to retain dividends until the shareholders had paid the taxes alleged to be due upon their shares of stock. Each and every of them was entitled to $1,000 of personal property exempt, laying out of view altogether the question of an exemption of the shares themselves from the taxes claimed to be due: so that the jurisdiction of the court is invoked argumentatively, the conclusion being reached that the requisite jurisdictional amount exists, to predicate the recovery against the corporation.

In the case cited on appellant's brief, Mr. Caldwell, judge, undoubtedly says that a bill of discovery is the proper remedy, but this court is not governed by the views of any other court upon the construction of pleading in equity. Here the question is, does the pleading state a cause of action cognizable on the equity side of the Circuit Court of the United States for the Western Division of the Western District of Tennessee?

Coats vs. Allen, 149 U. S., 456.

The pleading, then, is to be examined in order to see whether or not a cause of action is stated against the defendant Omberg, or rather, the Bank of Commerce, upon which its cashier is required to answer according to the practice of the High Court of Chancery of England. The allegation is as follows: "To the end that complainants may fairly and properly test the question as to whether by legal effect of the charter of the defendant corporation, either the shares of stock in the hands of the stockholders or the capital stock in the hands of the bank, or both, are exempt from taxation. J. A. Omberg, cashier of said bank and the custo-

dian of its books now, and for many years heretofore, including the year 1887, is made a defendant thereto, and is required in his answer to state under oath from the books of said defendant corporation the names of all the persons, firms or corporations owning shares of stock in said bank on the 10th day of January of each and every year, and the amount held by each since and including the year 1887."

No particular matter is stated, or facts disclosed resting within the knowledge of the defendant Omberg to enable the complainants to prosecute actions against the shareholders. What is desired by complainants is the test of the question stated on their bill, and not discovery in order to a right of action, without which the right of action would fail. The bill, therefore, by the authorities is necessarily not cognizable as a bill for discovery.

Pomery's Equity Jurisprudence, Vol. 1, Sec. 201.

Brown vs. Swan. 10 Pet., 503.

The shares and the capital are distinct. The shares belong to the individual stockholders; the capital belongs to the corporation. Both may be taxed without creating double taxation. If the tax is levied on the shares, then it is assessed separately against each shareholder by including the value of his shares in the value of his other taxable personal property. The corporation is not liable for this tax. Each shareholder is separately liable for the tax on his shares. There is no joint liability. The state may enforce the collection of the tax by suit against any one stockholder and neglect to enforce its collection as to others. The fact that similar suits were not brought against any of the other stockholders would be no defense as to the one proceeded against. The defenses might be different. One might prove payment, another could show that his shares were exempt under the provisions of our constitution exempting one thousand dollars worth of personal property in the

hands of each taxpayer from taxation; a third might establish that a fund devoted exclusively to religious, charitable, scientific, literary or educational purposes had been invested in the shares, and that therefore they were not taxable. The fact that the shareholders might have one common defense would not change the nature of the liability or be a ground for joining them all in one suit. It required a special statute in Tennessee, to authorize the joinder of several tax debtors in one suit. But this statute does not affect suits in equity in the Federal Courts. The English Chancery practice prevails here. The result is, the amount in controversy between the State and each individual shareholder must exceed, exclusive of interest and costs, the sum or value of two thousand dollars in order to give jurisdiction to the courts of the United States. That it may be a proper case for discovery does not alter the result. A court will not sustain a bill for the discovery of facts, which, after they are disclosed, will defeat its jurisdiction, nor does the fact that it is made the duty of the corporation to withhold dividends so far as may be necessary to pay the tax levied and assessed against the shareholder cut any figure in this question. This provision simply puts the corporation in the attitude of a garnishee who has property of the debtor in his hands at the time the garnishment is served. The debtor is a necessary party to such proceeding. His liability must be first established; and if the court is without jurisdiction as to the debtor, it is equally without jurisdiction as to the garnishee.

JULIUS A. TAYLOR,
THOMAS B. TURLEY,
WILLIAM H. CARROLL.

APPENDIX.

Sec. 8. Be it further enacted, That no tax shall hereafter be assessed upon the capital of any bank or banking association, or any other joint stock company or corporation organized under the authority of this State or the United States; but the stockholders and bondholders in such bank or banking association, or other corporation, shall be assessed and taxed on the market value of their shares of stock and bonds therein; said shares of stock and bonds shall be included in the valuation of personal property of such stockholders or bondholders in the assessment of State, county or municipal taxes at the place, town, ward or district where such bank or banking association, or other corporation, is located (except otherwise provided by law), whether said stockholder or bondholder resides in said place, town, ward or district or not; and all banks or banking associations or other corporations shall, in addition, be liable for taxes on any property, funds or assets owned by them not included in the foregoing provisions of this section; and the property and shares of stock in companies or corporations organized under the laws of the State of Tennessee, and firm or firms engaged in manufacturing articles of the produce of this State exclusively shall be assessed as one property, in the same manner as the property of firms and individuals is assessed.

Sec. 12. Be it further enacted, That for the purpose of collecting such taxes, and in addition to any other laws of this State relative to the imposition and collection of taxes, it shall be the duty of the president or managing officer of every bank or other corporation doing business in the State, to retain so much of any dividend or interest belonging to such stockholder or bondholder

as may be necessary to pay any and all taxes assessed in pursuance of this act, until it shall be made to appear to such officers that said taxes have been paid.

Sec. 14. Be it further enacted, That this act shall not be so construed, and shall not so operate as to exonerate or release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation: but it is hereby enacted that in all cases where such stock is exempted, such company or corporation shall be assessed in such way as may be lawful; and in all cases in which by the terms or legal effect of the charter the shares of stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of stock is fixed and prescribed and declared to be in lieu of all other taxes, taxes for State, county and municipal purposes shall be assessed and levied at a rate uniform with the rate levied upon other taxable property, upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus.

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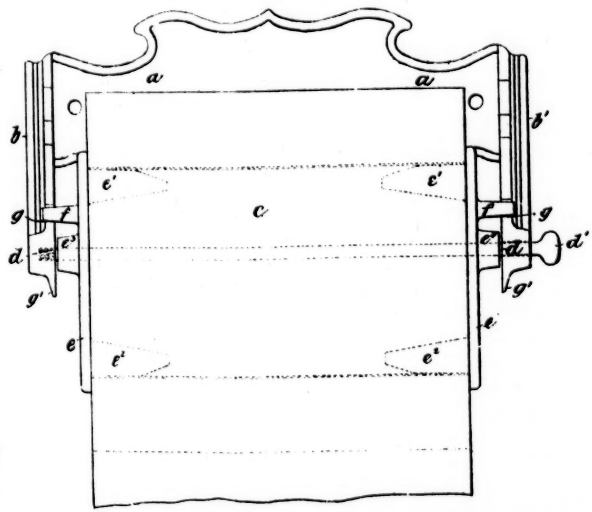
FIG. 1.



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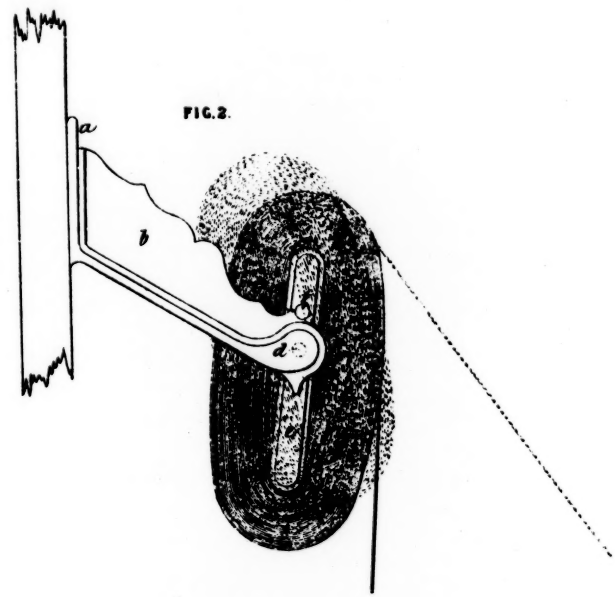

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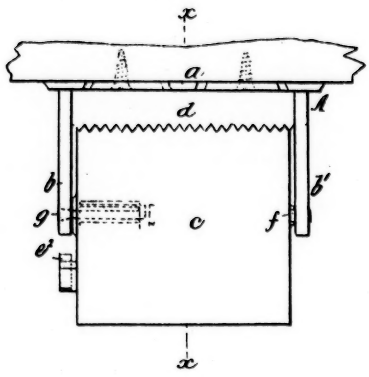
FIG. 1.



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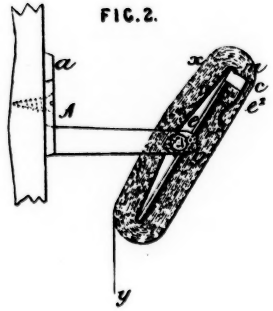

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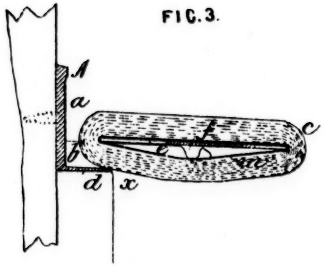

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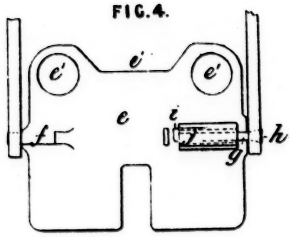
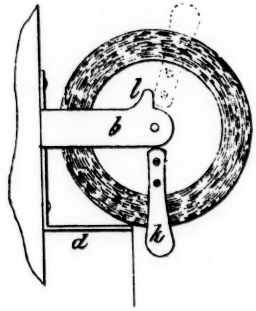


FIG. 5.



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